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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 15

A. S. ALEXANDER, H. D. RUMMEL AND GEORGE S. BATON, AS RECEIVERS, ETC., PETITIONERS,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 1, 1935.

CERTIORARI GRANTED MAY 6, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 15

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INDEX

	Original	Print
Record from D. C. U. S., Southern District of West Virginia	1	1
Caption.....(omitted in printing)..	1	
Order of reference to special master, etc	1	1
Proof of claim of Hecla Coal & Coke Company	4	4
Proof of claim of Thomas Watson	6	6
Proof of claim of Hillman Coal & Coke Company	11	10
Proof of claim of J. H. Hillman, Jr., and A. B. Sheets	15	13
Order filing ancillary bill of complaint, etc	21	19
Motion to vacate order filing ancillary bill of complaint, etc	23	20
Decree sustaining motion to vacate order	25	22
Memorandum decision of the Court, McClintic, J	26	23
Assignment of errors and prayer for reversal	28	25
Præcipe for transcript of the record	29	26
Notice as to filing of præcipe for transcript of the record	32	28
Order as to contents of record on appeal	33	29

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	Original	Print
Appellees' objections to appellants' directions as contained in precipe for transcript of the record	37	32
Appellees' objections to appellants' statement of essential parts of evidence, etc	41	35
Statement of essential parts of evidence, etc	43	36
Notice of lodging, in Clerk's office, of statement of essential parts of evidence, etc	45	38
Ancillary bill of complaint	46	39
Order filing affidavit of Ira H. Mottesheard, etc	66	56
Affidavit of Ira H. Mottesheard, Clerk	67	57
Motion to quash service and dismiss bill of complaint	68	58
Decree, bill of complaint dismissed, etc	70	60
Assignment of errors and prayer for reversal	72	61
Stipulation relative to printing of record under Rule 23	73	63
Petition for appeal; recital as to	74	63
Order allowing appeal; recital as to	74	63
Bond on appeal; recital as to	74	63
Citation; recital as to	74	64
Clerk's certificate (omitted in printing)	74	
Proceedings in U. S. C. C. A., Fourth Circuit	75	64
Docket entries	75	64
Opinion, Northcott, J	76	66
Separate opinion, Soper, J	86	74
Decree	88	77
Petition of appellants for rehearing, etc	89	78
Order staying mandate	97	84
Order denying rehearing	97	85
Order staying mandate pending application for writ of certiorari	98	85
Clerk's certificate (omitted in printing)	99	
Order allowing certiorari	100	86

[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

No. 1434. In Equity

PIEDMONT COAL COMPANY, a Corporation Created and Existing under the Laws of the Commonwealth of Pennsylvania, and G. S. Harah, Edgar S. Hackney and J. E. Hess, the Three Individuals Residing in the City of Uniontown, County of Fayette, and Commonwealth of Pennsylvania, and All the Plaintiffs Being Citizens of Said Commonwealth and Domiciled in the Western District Thereof,

vs.

TOWER HILL CONNELLSVILLE COKE COMPANY OF WEST VIRGINIA, a Citizen of the State of West Virginia, Domiciled in the Southern District Thereof

ORDER OF REFERENCE, ETC.—Dec. 12, 1933

[fol. 2] On this day this cause came on to be heard at this term upon notice heretofore given, and thereupon came the plaintiffs by their attorneys, and likewise came the defendant by its attorney, and the Receivers heretofore appointed herein by their attorney, and it appeared to the Court that this cause involves matters of accounts, and it having been shown that exceptional conditions herein within the meaning of Federal Equity Rule 59 require a reference, it is ordered, adjudged and decreed that this cause be, and the same is hereby referred to J. E. Campbell, Esq., of the City of Charleston, West Virginia, as Special Master (the said Campbell being suggested by counsel for plaintiffs and defendant as a proper person for such appointment, it being understood that this shall not be regarded as a consent decree by reason of such suggestion), to take, state and report an account and report to the Court showing:

(1) All the debts, obligations and claims against the said defendant, Tower Hill Connellsville Coke Company of West Virginia, the nature, amount and respective priorities thereof, together with any interest that may have accrued

thereon, and whether or not any one or more of said debts are secured by liens upon property of the defendant or otherwise secured, and the validity and character of such security, and any property subject to such liens, and the persons, firms and corporations, with their addresses, who are respectively owners or holders of, or assert claims with respect to, said debts, obligations and claims;

(2) The owners of the preferred stock of said Tower Hill Connellsville Coke Company of West Virginia, together with their addresses so far as obtainable, the number of shares held by each of them, and the dividends accumulated and unpaid thereon;

(3) The owners of all the common stock of said Tower Hill Connellsville Coke Company of West Virginia, including their names and addresses so far as obtainable and the number of such shares held respectively by them; and

(4) Such other matters as any party in interest may require, the same being pertinent, or such other matters as said Master himself may deem pertinent, whether so required or not.

[fol. 3] The said Special Master shall have power to compel the attendance of, and to administer oaths to, witnesses, and shall have all powers and authorities set forth in United States Equity Rule 62, and is hereby authorized to employ stenographic and clerical assistance.

Before proceeding the said Special Master shall give notice to all parties to this cause, and to all claimants, creditors, and all persons claiming to be creditors, and to all preferred stockholders and to all common stockholders of Tower Hill Connellsville Coke Company of West Virginia, a corporation, defendant herein, of the time and place of the hearing of the matters hereby referred to him, by publication once each week for four successive weeks (a period of at least twenty-eight days to elapse between the first publication thereof and the commencement of said hearing), in The Charleston Daily Mail, a newspaper of general circulation published in the City of Charleston, County of Kanawha, State of West Virginia, and in the Pittsburgh Post-Gazette, a newspaper of general circulation published in the City of Pittsburgh, County of Allegheny, State of Pennsylvania. In addition to said publi-

cation said Special Master shall give due notice of said hearing to each of the parties to this cause, or their solicitors, as required by Equity Rule 60, and to the Receivers of the defendant, Tower Hill Connellsville Coke Company of West Virginia, or to their solicitors. Said Special Master shall have the right, without further notice, to adjourn said hearing from time to time.

It is further ordered that when the said Special Master shall fix the time and place of hearing as aforesaid, the Receivers heretofore appointed in this cause shall mail a copy of the notice of such hearing to all the creditors and stockholders of the defendant, Tower Hill Connellsville Coke Company of West Virginia as the same appear from any books of the defendant Corporation that may be in their hands, but the failure of the Receivers so to do shall not invalidate any proceeding of said Special Master and shall not invalidate or affect any hearing so long as notice by publication be given as hereinbefore directed.

The said Special Master shall report in writing to this Court, for its further action, his findings and conclusions, [fol. 4] in accordance with this decree, and shall accompany his report by all papers and documents filed before him, and by a transcript of all evidence taken and filed before him.

The Court doth reserve the right, pending said reference, to enter all proper orders and decrees in this cause.

It further appearing to the Court that there is pending in the United States District Court for the Western District of Pennsylvania, in an equity cause entitled A. S. Alexander, H. D. Rummel and George S. Baton, Receivers, versus Tower Hill Connellsville Coke Company of West Virginia, et al., being a proceeding of a nature ancillary to this cause, it is ordered that the Receivers heretofore appointed herein do tender to file a certified copy of this decree in said Court to the end that the Judges of said Court may be advised hereof.

IN UNITED STATES DISTRICT COURT

PROOF OF CLAIM OF HECLA COAL & COKE COMPANY AS THE OWNER OF SHARES OF THE PREFERRED STOCK AND THE COMMON STOCK OF THE TOWER HILL CONNELLSVILLE COKE COMPANY OF WEST VIRGINIA

In Equity

No. 1434

[Title omitted]

To J. E. Campbell, Special Master in Chancery in the above proceedings:

In compliance with the notice given by you under date of December 26, 1933, Hecla Coal & Coke Company, a corporation under the laws of the State of Pennsylvania, having its office and principal place of business in the First National Bank Building, City of Pittsburgh, Allegheny County, Pennsylvania, files this its proof of claim with you, for the purpose of participating in any distribution or liquidating dividend paid by the Tower Hill Connellsville Coke Company of West Virginia or the Receivers thereof, to either its Preferred or its Common stockholders or to both.

[fol. 5] The Tower Hill Connellsville Coke Company of West Virginia has issued the following certificates for shares of its Preferred stock to this claimant, Hecla Coal & Coke Company:

Date.	Certificate No.	Shares.
Apr. 3, 1924	A 522	25
Feb. 16, 1925	A 526	110
Dec. 31, 1928	A 528	380
Dec. 27, 1929	A 529	50
Aug. 13, 1930	A 530	240
Oct. 15, 1930	A 531	24
Nov. 26, 1930	A 532	33
Dec. 31, 1930	A 533	1,117
Dec. 31, 1931	A 534	48
Dec. 28, 1932	A 536	10
Total		2,037

(6) The Tower Hill Connellsville Coke Company of West Virginia has issued the following certificates for shares of its Common stock to this claimant, Hecla Coal & Coke Company:

Date.	Certificate No.	Shares
Nov. 16, 1926	B 1118	1,641
Dec. 31, 1926	B 1119	15
Apr. 14, 1927	B 1123	13
July 14, 1927	B 1126	110
Oct. 13, 1927	B 1127	50
Dec. 21, 1927	B 1129	33
Apr. 13, 1928	B 1131	12
July 14, 1928	B 1132	34
Dec. 31, 1928	B 1136	6
Apr. 26, 1929	B 1138	13
Dec. 27, 1929	B 1140	33
Apr. 14, 1930	B 1142	19
July 15, 1930	B 1143	13
Aug. 13, 1930	B 1145	6
Oct. 15, 1930	B 1152	29
Nov. 26, 1930	B 1154	123
Dec. [illegible], 1930	B 1162	247
Dec. 31, 1931	B 1170	54
Total		2,451

[fol. 6] The originals of said stock certificates will be exhibited to you by the claimant, Hecla Coal & Coke Company, for inspection and examination by you at any time which you may designate.

Hecla Coal & Coke Company, by A. B. Sheets, Vice-President. (Corporate Seal.)

Attest:

Thos. Watson, Secretary.

Duly sworn to by A. B. Sheets. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

[Title omitted]

Proof of Claim of Thomas Watson

To J. E. Campbell, Special Master in Chancery in the above proceedings:

[fol. 7] In compliance with the notice given by you under date of December 26, 1933, Thomas Watson, an attorney at law, having his office in the First National Bank Building in the City of Pittsburgh, Allegheny County, Pennsylvania, files with you his Proof of Claim against the Tower Hill Connellsville Coke Company of West Virginia in the sum of $33,750.00. The nature of this claim is as follows:

1. The claimant was employed as Secretary of the Tower Hill Connellsville Coke Company of West Virginia at a salary of $250.00 per month. Claimant discharged all of his duties as Secretary of said corporation from October 1, 1933, until on or about October 26, 1933, at which time the assets of the corporation were turned over to its receivers, and the management of the corporation's affairs was taken out of the hands of its executive officers.

2. On or about November 3, 1924, the plaintiffs herein filed their bill in equity against Tower Hill Connellsville Coke Company of West Virginia as defendant in the above proceedings. At or about this time the claimant was employed by Tower Hill Connellsville Coke Company, together with other attorneys, to represent the defendant in said proceedings. The claimant assisted in the drafting of the Defendant's Original Answer and the preparation of the case for trial. The claimant conducted the trial of said case upon behalf of the defendant, examining witnesses, and arguing the case before the District Court, assisting in the preparation of various briefs filed by the defendant with the District Court prior to the entry by said District Court of its Memorandum Opinion bearing date of April 5, 1928.

Claimant further assisted in the preparation of a petition to the United States Circuit Court of Appeals for the Fourth Circuit from the decree entered in these pro-

ceedings by the District Court under date of July 8, 1929. Claimant further assisted in the preparation of the record on appeal to the United States Circuit Court and in the preparation of the briefs prepared and filed by the defendant. Claimant assisted in the argument of the case before the United States Circuit Court of Appeals. Claimant further assisted in the preparation of a petition for a re-argument and brief in support thereoof which were filed with the Circuit Court of Appeals for the Fourth [fol. 8] Circuit after it had rendered its decision dated July 8, 1929.

Claimant further assisted in the preparation of the Answers filed by the defendant to the Plaintiffs' Amended and Supplemental Bill and the Plaintiffs' Second Amended and Supplemental Bill and in the preparation of the case for trial at the hearing commenced upon November 11, 1931. Claimant assisted in the examination of witnesses and in the argument of the case before the District Court. Claimant further assisted in the preparation of the briefs on behalf of the defendant with this District Court in said proceedings. Claimant further assisted in the preparation of an appeal to the United States Circuit Court of Appeals from the decree entered upon August 25, 1932, by the District Court in these proceedings, and in the preparation of the record on appeal including briefs on behalf of the defendant.

Claimant further assisted in the preparation of a Petition for Writ of Certiorari to the Supreme Court of the United States to review the decision of the Circuit Court of Appeals for the Fourth Circuit rendered upon April 22, 1933, including the preparation of brief accompanying said petition for writ of certiorari.

In the opinion of the Claimant, the fair and reasonable value of the services performed by him as aforesaid at the instance and request of the Tower Hill Connellsville Coke Company of West Virginia is the sum of $25,000, for which amount Claimant asks that his claim be allowed.

3. During the year 1920 Claimant was employed by Tower Hill Connellsville Coke Company of West Virginia to represent it as its attorney before the Bureau of Internal Revenue in the determination and adjustment of its Income and Excess Profits Taxes and other Federal taxes for the year- 1917, 1918, 1919 and 1920. From the time of

Claimant's first employment by the defendant in the year 1920 and continuing down to the year 1933, the federal taxes of the defendant corporation and of its two subsidiaries Tower Hill Connellsville Coke Company of Pennsylvania and Eastern Coke Company have been in course of settlement, adjustment and litigation.

For the year 1917 the Commissioner of Internal Revenue asserted a deficiency of taxes against the Defendant and [fol. 9] Tower Hill Connellsville Coke Company of Pennsylvania in the amount of $498,000.00. This amount represented a tax liability determined by the Commissioner of Internal Revenue over and above the tax liability shown by the Defendant and Tower Hill of Pennsylvania on their consolidated Income and Excess Profits Tax return for the year 1917. After numerous hearings and conferences in Washington, D. C., with the Bureau of Internal Revenue, it was determined that the correct tax liability of the defendant and of Tower Hill Connellsville Coke Company of Pennsylvania was $178,000.00 in excess of the amount shown upon the consolidated tax return of said corporation for the year 1917. The services rendered by this claimant were thus instrumental in effecting for the defendant and Tower Hill of Pennsylvania a saving of $320,000.00 in taxes, together with $80,000.00 which would have been the approximate interest on said $320,000.00 up to the date of settlement. Thus the total tax saving for the year 1917 was $400,000.00.

Upon the basis of depreciation, depletion, invested capital, war profits, etc., used by the Commissioner of Internal Revenue in determining the aforesaid deficiency of $498,000.00 in the taxes of the defendant and of Tower Hill of Pennsylvania for the year 1917, there would have been a deficiency of $900,000.00 in the tax liability of Defendant and of Tower Hill of Pennsylvania for the years 1918, 1919 and 1920. The correct tax liability of said corporation for the years 1918, 1919 and 1920 was determined by the Commissioner of Internal Revenue to be $495,000.00. Upon this basis, the services of the claimant have been instrumental in effecting a tax saving of $405,000.00 for said years 1918, 1919 and 1920.

The tax liability of said corporations for the year 1920 as determined by the Commissioner of Internal Revenue is contested by said corporations. They have filed a petition with the United States Board of Tax Appeals seeking to

have the tax deficiency asserted against them by the Commissioner of Internal Revenue re-determined and reduced. This case is now pending before the United States Board of Tax Appeals.

Claimant has also instituted proceedings in the District Court of the United States for the Western District of Pennsylvania for the recovery of $145,000.00 of taxes paid by the Defendant, together with interest thereon amounting to $39,000.00, making a total of $184,000.00. This case is pending and undetermined.

[fol. 10] In the opinion of the Claimant, the fair and reasonable value of the services performed by him as aforesaid at the instance and request of Tower Hill Connellsville Coke Company of West Virginia and its Pennsylvania subsidiary in connection with their Federal Income and Excess Profits tax matters is the sum of $40,000, for which amount Claimant asks that his claim be allowed.

Defendant and Tower Hill Connellsville Coke Company of Pennsylvania have made the following payments to this claimant upon account of his services as hereinabove set forth:

February 12, 1927	$ 5,000.00
February 23, 1927	5,000.00
July 28, 1927	6,000.00
October 17, 1927	5,000.00
June 25, 1931	8,000.00
May 12, 1932	2,500.00
Total payments	$31,500.00

The following is a statement of the Defendant's account with this Claimant:

Salary, October, 1933	$ 250.00
Services in litigation with the Piedmont Coal Company et al., as above set forth	25,000.00
Services in connection with Federal Income Tax matters as above set forth	40,000.00
Total	$65,250.00
Credits by cash received, as hereinabove set forth	31,500.00
Balance Due	$33,750.00

Claimant respectfully asks that his claim as above set forth may be allowed against the Defendant Tower Hill Connellsville Coke Company of West Virginia.

Thomas Watson.

[fol. 11] *Duly sworn to by Thomas Watson. Jurat omitted in printing.*

In United States District Court

Proof of Claim of Hillman Coal & Coke Company

No. 1434. In Equity

[Title omitted]

To J. E. Campbell, Special Master in Chancery in the above proceedings:

In compliance with the notice given by you under date of December 26, 1933, Hillman Coal & Coke Company, a corporation under the laws of the State of Pennsylvania, having its office and principal place of business in the First National Bank Building, in the City of Pittsburgh, Allegheny County, Pennsylvania, files with you its Proof of Claim against the Tower Hill Connellsville Coke Company of West Virginia in the amount of $2,720.03. The nature of this claim is as follows:

Commencing in the year 1920, Tower Hill Connellsville Coke Company of Pennsylvania, which held title to and operated the mines in Fayette County, Pennsylvania, now owned by Tower Hill Connellsville Coke Company of West [fol. 12] Virginia, entered into an agreement with the Hillman Coal & Coke Company, Hecla Coal & Coke Company, Thompson Connellsville Coke Company, and other associated and affiliated companies, engaged in the mining of coal, the manufacture of coke and the sale of coal and coke, under which agreement said companies would maintain a joint operating department, a joint engineering department, a joint general office in the City of Pittsburgh, and joint sales offices in Pittsburgh, Philadelphia and New York. It was agreed that the expenses of the foregoing departments would be incurred in the name of the Hillman

Coal & Coke Company, which acted as the Pool Manager. The other corporations parties to said agreement undertook to pay their pro-rata share of said joint expense.

By agreement between Tower Hill Connellsville Coke Company and the other interested companies, the expenses of the general office department and the operating department have at all times been apportioned to the individual mines of the various companies upon the basis of each mine's monthly output, with the proviso, however, that from time to time a schedule of prescribed minimum tonnages was set up for each mine, based upon a fixed, uniform percentage of the normal monthly output of said mines.

During the month of October, 1933, the general office expense for said consolidated group was $15,075.38, consisting of the following items:

Advertising	$ 62.50
Welfare Work	300.00
Credit Information & Collection Expense	125.00
Miscellaneous Office Expense	173.39
Office Supplies & Stationery	333.80
Postage	218.38
Rent	1,383.34
Salaries	11,669.82
Telephone & Telegrams	1,371.82
Expense Accounts	734.08
Depreciation	421.00
Membership Dues	288.50
Automobile Expense & Depreciation	174.33
Maintenance & Repairs to Equipment	8.78
Insurance Workmens Compensation	10.64
	$17,275.38
[fol. 13] Less Fixed charges not applicable to Pool Account	2,200.00
	$15,075.38

During the month of October, 1933, the operating department expenses of said consolidated group were $4,516.79,

consisting of the following items, all of which charges were applicable to the pool account:

Miscellaneous Office Expense	$ 60.66
Office Sup-lies and Stationery	13.66
Rent	353.00
Salaries	3,800.75
Expense Accounts	181.92
Membership Dues	7.50
Automobile Expense & Depreciation	6.72
Insurance Workmen's Compensation	46.02
Field Supplies	60.00
Total	$4,516.79

During the month of October, 1933, the Engineering Department expenses of said consolidated group were $2,464.28, consisting of the following items:

Miscellaneous Office Expense	$ 76.67
Office Sup-lies and Stationery	19.84
Rent	312.00
Salaries	1,916.65
Expense Accounts	54.83
Automobile Expense & Depreciation	68.41
Maintenance & Repairs to equipment	1.25
Insurance Workmens Compensation	12.37
Field Supplies	2.26
	$2,464.28
Less charges not applicable to Pool Account	483.10
	$1,981.18

By agreement between Tower Hill Connellsville Coke Company and the other interested companies, Engineering costs were apportioned as follows:

Each mine was charged with the actual time cost of work done specifically for that mine, and each mine was [fol. 14] charged with that portion of all overhead expenses as was represented by the ratio of the direct time charge of said mine to the total time charges of all mines in that month.

In accordance with the agreement between Tower Hill Connellsville Coke Company and the other interested com-

panies as above stated, Tower Hill Connellsville Coke Company's proportion of the general expenses of said joint operation for the month of October, 1933, was as follows:

General Office Expense	$1,995.35
Operating Department Expense	610.96
Engineering Services	113.72
Total	$2,720.03

All of the assets of the defendant Tower Hill Connellsville Coke Company of West Virginia passed into the possession of its receivers on or about October 26, 1933, and consequently the above items remained due, owing and unpaid. This claimant Hillman Coal & Coke Company has been obliged to pay said items representing the proportion of the joint expenses as above enumerated which Tower Hill Connellsville Coke Company of West Virginia had agreed to pay.

Hillman Coal & Coke Company. By W. L. Affelder, Vice-President. By J. M. Leithead, Ass't Treasurer.

(Corporate Seal.)

Attest:
Thos. Watson, Secretary.

[fol. 15] *Duly sworn to by W. L. Affelder et al. Jurat omitted in printing.*

In United States District Court.

No. 1434. In Equity

[Title omitted]

Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets as Sureties Upon the Supersedeas Bond of Tower Hill Connellsville Coke Company

To J. E. Campbell, Special Master in Chancery in the above proceedings:

In compliance with the notice given by you under date of December 26, 1933, J. H. Hillman, Jr., and A. B. Sheets,

both residents of Pittsburgh, Allegheny County, Pennsylvania, file with you their Proof of Claim of a contingent liability against the Tower Hill Connellsville Coke Company of West Virginia.

1. Upon August 25, 1932, the District Court entered a decree in the above proceedings which provided in paragraph 2 thereof as follows:

"That the business and affairs of Tower Hill Connellsville Coke Company of West Virginia, Defendant in this [fol. 16] cause, be terminated and wound up; that its properties and assets be sold and converted into money; and that distribution thereof be made to its creditors and stockholders according to their respective rights and priorities."

2. Said decree entered August 25, 1932, further provided in Paragraph 7 thereof as follows:

"That Defendant having indicated its intention to appeal to the United States Circuit Court of Appeals for the Fourth Circuit, the operation of this decree shall be suspended for the period of thirty days from the date of the entry hereof to enable the Defendant to perfect such appeal and, in accordance with the Stipulation and Agreement mentioned in the preceding paragraph hereof, the supersedeas bond on such appeal is fixed at one hundred thousand ($100,000.00) dollars, with the sureties and security provided in said Stipulation and Agreement; and likewise in accordance with said Stipulation and Agreement, it is ordered that the status of Defendant's properties, assets, liabilities and business be maintained and preserved in the manner and for the time provided in said Stipulation and Agreement."

3. There was filed with the decree entered August 25, 1932, a written Stipulation and Agreement between the plaintiffs and the defendant, which said Stipulation and Agreement was directed by said decree to be filed as a part of the record in the case, and to be included in the transcript of the record upon appeal. Said Stipulation and Agreement provided in Paragraph First as follows:

"Defendant's supersedeas bond upon its appeal to the United States Circuit Court of Appeals for the Fourth Circuit shall be in the sum of one hundred thousand ($100,000.00) dollars, conditioned as provided by the Act of Con-

gress. The sureties upon said bond shall be J. H. Hillman, Jr., and A. B. Sheets, of Pittsburgh, Pennsylvania, who shall deposit, or cause to be deposited, with The Central Trust Company, at Charleston, West Virginia, listed securities approved by attorneys for Plaintiffs or by this Court, of a market value at the time of deposit of not less than one hundred thousand ($100,000.00) dollars, as col- [fol. 17] lateral security to guarantee the punctual payment and discharge of such liability, if any, as said securities or either of them, may incur under or by reason of said bond, none of said securities to be the property of Defendant, and the instrument effecting such deposit to be in such form and to contain such provisions as shall be approved by attorneys for Plaintiffs or by this Court."

4. Tower Hill Connellsville Coke Company of West Virginia, Defendant in said proceedings, duly perfected its appeal to the United States Circuit Court of Appeals for the Fourth Circuit, and in connection therewith said defendant executed a supersedeas bond in the sum of $100,000.00, conditioned as provided by the Act of Congress. The said defendant executed said bond as principal, and these claimants, J. H. Hillman, Jr., and A. B. Sheets, of Pittsburgh, Pennsylvania, executed said supersedeas bond as sureties.

5. These claimants further complied with the provisions of the aforesaid First Paragraph of the Stipulation and Agreement by depositing listed securities, approved by attorneys for Plaintiffs, having a market value at time of deposit of not less than $100,000.00, as collateral security to guarantee the punctual payment and discharge of such liability, if any, as said sureties, or either of them, might incur under or by reason of said bond.

6. The securities deposited aforesaid by these claimants with The Central Trust Company at Charleston, West Virginia, as collateral security to guarantee the punctual payment and discharge of the liability, if any, of these claimants as said sureties for the defendant, Tower Hill Connellsville Coke Company of West Virginia, were as follows:

Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938

No. A00001441—With October 15, 1932, and A. S. C. A.		$5,000.00

United States Treasury 3⅛% Bonds of 1946-1949

No. 20407H	$10,000.00	
18517H	10,000.00	
[fol. 18]		
19782B	10,000.00	
15447H	10,000.00	
34062B	10,000.00	
12787H	5,000.00	
4407H	5,000.00	
6403C	5,000.00	
18568J	5,000.00	
4744D	5,000.00	
15111A	5,000.00	
92433C	1,000.00	
92434D	1,000.00	
92435E	1,000.00	
92436F	1,000.00	
92437H	1,000.00	
92438J	1,000.00	
92439K	1,000.00	
92440L	1,000.00	
92441A	1,000.00	
92442B	1,000.00	
92443C	1,000.00	
92444D	1,000.00	
92445E	1,000.00	
92446F	1,000.00	
92447H	1,000.00	
92448J	1,000.00	
92449K	1,000.00	
21483C	1,000.00	
85589K	1,000.00	
85590L	1,000.00	$100,000.00
With December 15, 1932, and all subsequent coupons attached		$105,000.00

None of the aforesaid securities are or ever were the property of Tower Hill Connellsville Coke Company of West Virginia.

6. The United States Circuit Court of Appeals for the Fourth Circuit affirmed the decree of the District Court entered upon August 25, 1932; and the Supreme Court of the United States refused the defendant's petition for a writ of certiorari to review the decision of said Circuit Court of Appeals for the Fourth Circuit.

7. Upon October 26, 1933, the officers of the defendant, Tower Hill Connellsville Coke Company of West Virginia, [fol. 19] in compliance with the decree of the District Court, paid to the receivers appointed to liquidate the assets of the defendant, all the cash in defendant's possession, amounting to the sum of $881,049.42, and further turned over and delivered to the said receivers all the stock, warrants, debentures, notes, agreement for royalties receivable, and other items of personal property, and furthermore delivered to said receivers possession of the lands, plants and equipment of the defendant, constituting its mines and coke operations in Fayette County, Pennsylvania.

8. That the assets in the hands of the receivers of the defendant are ample and sufficient in amount and value to immediately pay and discharge all of the liabilities of the defendant, including any damages and costs which the plaintiffs are entitled to recover from the defendant corporation upon the aforesaid supersedeas bond, leaving a substantial balance available for distribution to defendant's stockholders. It thus appears that the defendant or its receivers are in position to comply with defendant's obligation as the principal obligor upon said surety bond, to protect, indemnify and save harmless these claimants, from any and all liability as sureties upon the aforesaid supersedeas bond.

9. That Claimants through their attorneys have requested the plaintiffs to consent to the entry of an order in the above case by the District Judge, releasing and discharging these Claimants from all liability as sureties upon the aforesaid supersedeas bond of the defendant, and further authorizing, directing and empowering The Central Trust Company, at Charleston, West Virginia, to surrender, turn over and deliver to these claimants the securities hereinbefore enumerated in paragraph "6" hereof.

But the plaintiffs have refused to consent to the entry of such order as requested, and have indicated to claimants that it is the intention of the plaintiffs to assert liability against the claimants as sureties upon said supersedeas bond.

10. That the District Court of the United States for the Southern District of West Virginia has not up to this time been called upon to determine, and has not determined that there is any liability whatsoever upon said supersedeas bond, or that said liability should fall upon these claimants [fol. 20] and not upon Tower Hill Connellsville Coke Company of West Virginia as the principal obligor upon said supersedeas bond, or that the securities deposited by these claimants with The Central Trust Company, at Charleston, West Virginia, should not be returned to these claimants but should be sold and the proceeds applied to the discharge of the liability of these claimants as sureties upon said supersedeas bond.

11. That these claimants without admitting liability as sureties upon said supersedeas bond, and without prejudice in any manner to their right to contest any liability upon the supersedeas bond, but for the purpose of preserving their rights in the premises, pending the decision by the District Court of the United States for the Southern District of West Virgiia, hereby file their Proof of Claim against Tower Hill Connellsville Coke Company of West Virginia and its assets in the hands of its receivers, in the sum of $105,000.00, or any other amount which these claimants may be compelled to pay as sureties upon the supersedeas bond of the defendant. These claimants as sureties assert their rights to be protected, indemnified and saved harmless from any and all liability upon said supersedeas bond by Tower Hill Connellsville Coke Company of West Virginia, which is the principal obligor upon said bond.

12. In the event it is ultimately adjudicated that these claimants are not liable upon said supersedeas bond, and in event they are properly discharged and released from liability as sureties, and in event the securities enumerated in paragraph "6" hereof are returned to these claimants, then and in such event these claimants will withdraw any

and all claim hereon or hereunder against the defendant corporation.

J. H. Hillman, Jr., by Thos. Watson, Atty. A. B. Sheets.

[fol. 21] *Duly sworn to by A. B. Sheets. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

[Title omitted]

ORDER FILING ANCILLIARY BILL OF COMPLAINT ETC.—Feb. 19, 1934

This day came H. D. Rummell, A. S. Alexander and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, heretofore appointed herein, by counsel, and tendered and asked leave to file their Ancillary Bill of Complaint against J. H. Hillman, [fol. 22] Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, and upon consideration thereof, it is ordered:

1. That said Ancillary Bill of Complaint be, and hereby it is filed in this Court, with leave to the Defendants to move to dismiss, answer, or make such other defense thereto as may be proper, and for convenience the Clerk be, and hereby he is directed to give it a separate number but that it and all proceedings pursuant thereto shall be ancillary to this cause.

2. That each of said parties named as Defendants in said Ancillary Bill be, and hereby he or it is required to move to dismiss or to file his or its answer or other defense to said Ancillary Bill in the Clerk's office on or before March 19, 1934.

3. That the Receivers be, and hereby they are directed to cause a true and correct copy of this order and of said Ancillary Bill, certified by the Clerk, to be inserted in envelopes addressed to the following respective parties: J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal

and Coke Company and Hecla Coal and Coke Company, each at First National Bank Building, Pittsburgh, Pennsylvania, and each such envelope to be properly stamped and registered and to be deposited in the United States mail at Charleston, West Virginia, on or before February 20, 1934, and on or before said latter date a copy of this order and of said Ancillary Bill, likewise certified by the Clerk, to be delivered at the office of E. W. Knight, Esq., in Charleston, West Virginia.

4. All questions as to the jurisdiction of this Court and other questions are reserved by this Court for future decision as such question may arise, and nothing is herein decided except that the bill shall be filed and notice thereof be had as directed above.

[fol. 23] IN UNITED STATES DISTRICT COURT

MOTION TO VACATE ORDER OF COURT ENTERED FEBRUARY 19, 1934, AND TO QUASH SERVICE OF SAID ORDER AND OF THE BILL OF COMPLAINT THEREIN MENTIONED—Filed March 19, 1934

No. 1434. In Equity

[Title omitted]

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

Appearing specially for the purpose of making this motion and not intending to submit himself or itself to the jurisdiction of this Court but solely for the purpose of questioning such jurisdiction come J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, each by his or its counsel, and move the Court to vacate its order entered at the above Number in Equity on February 19, 1934, and to quash the service of the said order and of the Ancillary Bill of Complaint therein mentioned and filed at No. 3370 in Equity of this Court in which cause A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of said Tower Hill Connellsville Coke Company of West Virginia,

are plaintiffs and the said J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company are defendants, because

[fol. 24] (a) At the time of the entry of the said order, the filing of the said Ancillary Bill and the alleged service thereof upon each of the defendants and ever since said date no one of the defendants was or is a citizen or resident or inhabitant of or to be found within or was doing business within the Southern District of West Virginia, or anywhere within the State of West Virginia.

(b) The said J. H. Hillman, Jr., A. B. Sheets and Thomas Watson were at the time of the filing of this suit and always since have been each a citizen and inhabitant of the Commonwealth of Pennsylvania and a resident of the City of Pittsburgh, Allegheny County, in said Commonwealth. Hillman Coal and Coke Company and Hecla Coal and Coke Company is each a corporation incorporated and existing under the Laws of the Commonwealth of Pennsylvania, having its domicile in the City of Pittsburgh, in said Commonwealth and is a citizen, resident and inhabitant of said Commonwealth within the purview of Section 51 of the Judicial Code of the United States with respect to venue.

(c) Your Honorable Court is without jurisdiction over any of the said individuals, or either of the said corporations named as parties defendant in the said Ancillary Bill of Complaint. Neither the alleged mailing to each of them in the manner set forth in the said order of court entered February 19, 1934, of a copy of the said order and of a copy of the said Ancillary Bill of Complaint therein referred to, nor the alleged delivery of such copies at the office of E. W. Knight, Esq., Charleston, West Virginia, constitute service upon the defendants named in the said Ancillary Bill of Complaint.

E. W. Knight, Brown, Jackson & Knight, Alter, Wright and Barron, Attorneys for J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company appearing specially for the sole purpose aforesaid.

[fol. 25] IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

PIEDMONT COAL COMPANY, a Corporation Created and Existing under the laws of the Commonwealth of Pennsylvania, and G. S. Harah, Edgar S. Hackney and J. E. Hess, the Three Individuals Residing in the City of Uniontown, County of Fayette, and Commonwealth of Pennsylvania, and All the Plaintiffs Being Citizens of Said Commonwealth and Domiciled in the Western District Thereof,

vs.

TOWER HILL CONNELLSVILLE COKE COMPANY OF WEST VIRGINIA, a Citizen of the State of West Virginia, Domiciled in the Southern District Thereof

DECREE—July 30, 1934

This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

(1) That the Memorandum Decision as this day amended, filed and made a part of the record in Equity Cause No. 3370, be and hereby is also filed and made a part of the record in this cause.

(2) That for the reasons stated in the said Memorandum Decision as amended, the motion of J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint Therein Mentioned" be and hereby it is sustained, and the said Order of Court entered February 19, 1934, be and hereby it is vacated, but this decree is without prejudice to A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, to assert the matters of fact and to seek the remedies set out in said Bill of Complaint in any court having jurisdiction.

(3) That said J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal

[fol. 26] and Coke Company shall recover their costs accrued upon said Motion.

Thereupon A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, by counsel, excepted to said decree of the Court, which exception is allowed, and at their instance a bill is sealed.

IN UNITED STATES DISTRICT COURT

No. 3370. In Equity

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and Hecla Coal and Coke Company, a Corporation

MEMORANDUM DECISION—Filed July 30, 1934

McCLINTIC, District Judge:

On the 19th day of February, 1934, the plaintiffs filed their ancillary bill of complaint in this cause against the defendants above named. It will be useless, so far as this memorandum is concerned, to give the history of the case, as that can easily be found in the decisions heretofore rendered by this court and by the Circuit Court of Appeals.

This bill is for the purpose of collecting large sums of money, from the defendants, alleged to be due to the receivers herein, and this bill is a consequence of the decisions of the courts in this case heretofore made.

The question before me is, has this court jurisdiction of this suit, and jurisdiction over these defendants, under the circumstances as they now stand herein?

The claim of the plaintiffs is that by reason of the appearance of these defendants in this suit before the Master [fol. 27] to whom this suit had been rendered, and by reason of the claims of these defendants filed before the Master, claiming certain sums of money in each case to be due each

one thereof, each one of them became a party to this suit for all purposes, and that by reason thereof, the receivers had a right to file this ancillary bill in this suit to recover the sums of money claimed.

For the purpose of information, this court entered an order on the 19th day of February, 1934, requiring the defendants to appear by a certain date and make any motions they might desire, and directing that a true copy of the order and of the bill be delivered to the defendants.

This order, and the things to be done thereunder, were then or now in no way intended to be a service of process upon these defendants. The whole theory of the plaintiffs was and is that these defendants were already parties to this suit, and did not require any service of process upon them, other than to give them notice of the filing of the bill.

By motions filed on the 19th day of March, 1934, the defendants first moved to quash what they called "service" upon the defendants, and to dismiss the bill for want of jurisdiction; also moved to vacate the order of court entered on the 19th day of February, 1934, and to quash the service of said order and of the bill of complaint mentioned therein.

As stated above, there was no pretense that such order was a service of process.

The sole question here is, has this court, under the circumstances herein set out, jurisdiction of the defendants? This question has been fully argued, and briefs have been filed by each side. Under the decisions of the Supreme Court of West Virginia, I am inclined to hold that they are parties for all purposes. However, I find but little, if any, supporting authority from federal courts for that holding.

I appreciate the fact that if I were to so hold, then the suit would have to proceed to a final conclusion before the question of jurisdiction could be finally decided. Great cost and expense would be incurred. It is to be regretted that a Federal District Judge has no way of certifying a question of this character to the Circuit Court of Appeals.

I think it right, in this case, however, to enter an order sustaining the motion of the defendants, so that the plain-
[fol. 28] tiffs can appeal therefrom and we can be favored with a final decision on the question whether this court has or has not jurisdiction, as claimed by the plaintiffs, and

which is denied by the defendants. This is, in one sense, an administrative act, but it will be the final order of this court on this question unless reversed by the court of superior jurisdiction.

Therefore, it will be the order of this court that the motions of the defendants, and each of them, be sustained.

IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed July 30, 1934

And the said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, assign the following errors in the record and proceedings in said cause:

(1) The District Court of the United States for the Southern District of West Virginia erred in entering its decree of July 30, 1934.

(2) Said Court erred in sustaining the motion of J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, filed March 19, 1934, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint Therein Mentioned".

[fol. 29] (3) Said Court erred in not overruling said motion.

(4) Said Court erred in vacating its order entered February 19, 1934.

(5) Said Court erred in entering its decree of July 30, 1934, at No. 3370 in Equity (known as the "Ancillary Cause"), sustaining the motion filed therein March 19, 1934, and dismissing the Ancillary Bill of Complaint filed therein February 19, 1934.

For which errors, said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers, pray that said decree of the United States District Court for the Southern District of West Virginia, entered July 30, 1934, in the above entitled cause, be reversed and the cause remanded, with directions to overrule said motion and to reinstate its said order entered February 19, 1934, and for such other and further relief as may be proper in the premises.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton, Counsel for Appellants.

IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 30, 1934

[fol. 30] To Ira H. Mottesheard, Esq., Clerk:

Prepare and certify a transcript of the record for transmission to the Circuit Court of Appeals for the Fourth Circuit, in pursuance of the appeal heretofore taken, and include therein the following documents, some of which are filed at the above number (hereinafter referred to as the "Primary Cause"), and the others at No. 3370 in Equity (hereinafter referred to as the "Ancillary Cause"):

(1) Order entered in the Primary Cause December 12, 1933, appointing J. E. Campbell, Special Master.

(2) Statement in narrative form, pursuant to Equity Rule 75, of the evidence in the Primary Cause as approved by the Court or the Judge.

(3) Proof of claim of Hecla Coal and Coke Company filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Hecla Coal and Coke Company as the Owner of Shares of the Preferred Stock and the Common Stock of the Tower Hill Connellsville Coke Company of West Virginia".

(4) Proof of claim of Thomas Watson filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Thomas Watson".

(5) Proof of claim of Hillman Coal and Coke Company filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Hillman Coal and Coke Company."

(6) Proof of claim of J. H. Hillman, Jr., and A. B. Sheets filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets, as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company".

(7) Order entered February 19, 1934, in the Primary Cause.

(8) Ancillary Bill of Complaint filed February 19, 1934, in the Ancillary Cause.

(9) Affidavit of Ira H. Mottesheard filed February 19, 1934, in the Ancillary Cause.

(10) Order entered February 19, 1934, in the Ancillary Cause, filing said affidavit.

[fol. 31] (11) Motion filed March 19, 1934, in the Primary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint Therein Mentioned".

(12) Motion filed March 19, 1934, in the Ancillary cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction".

(13) Opinion of the Court marked "Memorandum Decision" filed in both Causes, sustaining said motions.

(14) Decree entered July 30, 1934, in the Primary Cause.

(15) Decree entered July 30, 1934, in the Ancillary Cause.

(16) Assignment of errors and prayer for reversal filed in the Primary Cause.

(17) Assignment of errors and prayer for reversal filed in the Ancillary Cause.

(18) This præcipe and such orders or directions as the Court or the Judge may enter or give relating to the transcript of the record pursuant to Equity Rule 75.

(19) Memorandum in accordance with Section 7 of Rule 14 of the Circuit Court of Appeals for the Fourth Circuit.

(20) Clerk's Certificate.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton, Attorneys for A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, Appellants.

Dated July 30, 1934.

[fol. 32] IN UNITED STATES DISTRICT COURT

NOTICE AS TO PRÆCIPE—Filed July 30, 1934

No. 1434. In Equity

[Title omitted]

To Edward W. Knight, Esq., and Alexander J. Barron, Esq., Attorneys for J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appellees:

You are hereby notified that on the 30th day of July, 1934, the Appellants, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, filed with the Clerk of the District Court of the United States for the Southern District of West Virginia their præcipe indicating the portions of the record to be incorporated in the transcript of the record on their appeal in the above-entitled cause, a copy whereof being attached hereto.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton, Attorneys for Appellants.

July 30, 1934.

July 30, 1934, service of the above notice is hereby accepted and receipt of a copy thereof and of the præcipe therein mentioned is hereby acknowledged.

E. W. Knight, Attorney for Appellees.

[fol. 33] IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

[Title omitted]

ORDER AS TO RECORD—Aug. 6, 1934

This cause came on to be further heard at this term, and thereupon came A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, appellants in the appeal heretofore allowed in this cause, by E. C. Higbee and Arthur S. Dayton, their attorneys; and thereupon came J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation, appellees in the foregoing appeal, by Edward W. Knight, and Alexander J. Barron, their attorneys, appearing especially for the sole purposes hereinbefore set forth in this cause, and thereupon the said appellees tendered their objections in writing to appellants' direction as contained in their præcipe for transcript of record, and appellees' objections to appellants' statement of essential parts of evidence and proceedings at a hearing held at Charleston, West Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to decree of reference entered on December 12, 1933, and the same are hereby ordered filed. And thereupon appellees waived provisions of Equity Rule 75 as to proof or acknowl-
[fol. 34] edgment of service of a copy of the præcipe for the record in this cause, and waived provisions that the said præcipe should be lodged ten days in the Clerk's office, and waived all requirements as to notice and lodging in the Clerk's office of appellants' statement of essential parts of the evidence, and waived all requirements as to notice of this hearing, and it was agreed by the parties that all matters relating to the settlement and determination of the record upon the appeal heretofore awarded in this cause should be submitted to the Court at this time and place. And thereupon the Court having maturely considered appellees' objections to appellants' statement of essential parts of evidence and proceedings at a hearing held at Charleston, West Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to decree of refer-

ence entered December 12, 1933, is of opinion to and doth hereby overrule the same, and the said statement of essential parts of evidence marked "Statement of Essential Parts of Evidence and Proceedings at a hearing held at Charleston, West Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to Decree of Reference entered December 12, 1933", is hereby approved by the Court and ordered filed and is ordered to be made a part of the record for the purposes of said appeal. And the Court having maturely considered appellees' objections to appellants' directions as contained in their præcipe for transcript of record is opinion to, and doth overrule the same, and it is accordingly adjudged, ordered and decreed that the record upon the appeal allowed in this cause on the 30th day of July, 1934, shall be in accordance with appellees' præcipe for transcript of record filed in this cause on the 30th day of July 1934, and the Court doth decree, and doth hereby direct, that the record in this cause, being No. 1434 in equity, hereinafter referred to as the "primary cause", (the cause No. 3370 in equity being hereinafter referred to as "ancillary cause") shall consist of the following that is to say:

(1) Order entered in the Primary Cause December 12, 1933, appointing J. E. Campbell Special Master.

(2) Statement in narrative form, pursuant to Equity Rule 75, of the evidence in the Primary Cause as approved by this order.

[fol. 35] (3) Proof of claim of Hecla Coal and Coke Company filed January 30, 1934, in the Primary Cause marked "Proof of Claim of Hecla Coal and Coke Company as the Owner of Shares of the Preferred Stock and the Common Stock of the Tower Hill Connellsville Coke Company of West Virginia".

(4) Proof of claim of Thomas Watson filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Thomas Watson".

(5) Proof of claim of Hillman Coal and Coke Company filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Hillman Coal and Coke Company".

(6) Proof of claim of J. H. Hillman, Jr., and A. B. Sheets filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets, as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company".

(7) Order entered February 19, 1934, in the Primary Cause.

(8) Ancillary Bill of Complaint filed February 19, 1934, in the Ancillary Cause.

(9) Affidavit of Ira H. Mottesheard filed February 19, 1934, in the Ancillary Cause.

(10) Order entered February 19, 1934, in the Ancillary Cause, filing said affidavit.

(11) Motion filed March 19, 1934, in the Primary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint Therein Mentioned".

(12) Motion filed March 19, 1934, in the Ancillary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hill-
[fol. 36] man Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction".

(13) Opinion of the Court marked "Memorandum Decision" filed in both Causes, sustaining said motions as amended by decree of July 30, 1934, in the Ancillary Cause.

(14) Decree entered July 30, 1934, in the Primary Cause.

(15) Decree entered July 30, 1934, in the Ancillary Cause.

(16) Assignment of errors and prayer for reversal filed in the Primary Cause.

(17) Assignment of errors and prayer for reversal filed in the Ancillary Cause.

(18) The said præcipe for the record hereinbefore referred to, this order and decree, and said objections of appellees.

(19) Memorandum in accordance with Section 7 of Rule 14 of the Circuit Court of Appeals for the Fourth Circuit.

(20) Clerk's Certificate.

All of which is ordered and decreed accordingly.

[fol. 37] IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

[Title omitted]

APPELLEES' OBJECTIONS TO APPELLANTS' DIRECTIONS AS CONTAINED IN THEIR PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 6, 1934

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

And now come J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appellees, by Edward W. Knight, Esq., and Alexander J. Barron, Esq., their solicitors, appearing specially for the sole purpose hereinbefore set forth in this cause and file the following objections to Appellants' Præcipe for the Transcript of the Record and the directions therein contained as to the general contents thereof, viz.:

One. Appellees object to the inclusion in said Transcript of the Record of the document designated in Paragraph Numbered (2) of Appellants' Præcipe as "Statement in narrative form, pursuant to Equity Rule 75, of the evidence [fol. 38] in the Primary Cause as approved by the Court or the Judge".

For the reason that the said Statement of Evidence is a narrative of certain testimony taken before J. E. Campbell, Special Master, in hearings which have not yet been concluded by him and is therefore incomplete and said testimony has not yet been returned by the said Special Master to this Court and no report thereon has been made or filed of record in this cause by said Special Master.

Two. Appellees object to the inclusion in said Transcript of the Record of the documents designated in Paragraphs Numbered (3), (4), (5) and (6) of Appellants' Præcipe, being certain Proofs of Claim presented on behalf of the Appellees to the said Special Master.

For the reason that no disposition has yet been made of said claims by said Special Master, no report thereon has been made by him or filed of record in this cause and the said Proofs are not a part of the record in this cause.

Three. Appellees object to the inclusion in said Transcript of the Record of the Bill of Complaint designated in Paragraph Numbered (8) of Appellants' Præcipe "Ancillary Bill of Complaint filed February 19, 1934, in the Ancillary Cause".

For the reason that the said Bill of Complaint is not filed in and is not a part of the record of this cause.

Four. Appellees object to the inclusion in said Transcript of the Record of the document designated in Paragraph Numbered (9) of Appellants' Præcipe as "Affidavit of Ira H. Mottesheard filed February 19, 1934, in the Ancillary Cause".

For the reason that the said affidavit was not filed in and is not a part of the record in this cause.

Five. Appellees object to the inclusion in said Transcript of the Record of the Order designated in Paragraph Numbered (10) of Appellants' Præcipe as "Order entered February 19, 1934, in the Ancillary Cause, filing said affidavit". [fol. 39] For the reason that the said Order is not filed in and is not a part of the record in this cause.

Six. Appellees object to the inclusion in said Transcript of the Record of the Motion designated in Paragraph Numbered (12) of Appellants' Præcipe as "Motion filed March 19, 1934, in the Ancillary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled 'Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction.' ".

For the reason that the said Motion is not filed in and is not a part of the record in this cause.

Seven. Appellees object to the inclusion in said Transcript of the Record of the Decree designated in Paragraph Numbered (15) of Appellants' Præcipe as "Decree entered July 30, 1934, in the Ancillary Cause".

For the reason that the said Decree is not filed in and is not a part of the record in this cause.

Eight. Appellees object to the inclusion in said Transcript of the Record of the Instrument designated in Paragraph Numbered (17) of Appellants' Præcipe as "Assignment of errors and prayer for reversal filed in the Ancillary Cause".

For the reason that the said Instrument is not filed in and is not a part of the record in this cause.

Appellees further submit that the Transcript of the Record in this cause shall consist of the following documents only:

(1) Order of Court entered December 12, 1933, in this cause.

(2) Order of Court entered February 19, 1934, in this cause.

[fol. 40] (3) Motion filed March 19, 1934, in this cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Vacate Order of Court entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint therein mentioned".

(4) Opinion of the Court marked "Memorandum Decision" filed in this cause sustaining said Motion.

(5) Decree entered July 30, 1934, in this cause.

(6) Assignment of Errors and prayers for reversal filed in this cause.

(7) Appellants' Præcipe for Transcript of Record; Appellees' Objections thereto, as herein set forth, and such Orders and Directions as the Court or the Judge may enter or give relating to the Transcript of Record pursuant to Equity Rule 75.

(8) Memorandum in accordance with Section 7 of Rule 14 of the Circuit Court of Appeals for the Fourth Circuit.

(9) Clerk's certificate.

Edward W. Knight, Alexander J. Barron, Solicitors for Appellees, J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appearing Specially for the Sole Purpose Hereinbefore Set Forth, etc.

[fol. 41] IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

[Title omitted]

APPELLEES' OBJECTIONS TO APPELLANTS' STATEMENT OF ESSENTIAL PARTS OF EVIDENCE AND PROCEEDINGS AT A HEARING HELD AT CHARLESTON, WEST VIRGINIA, BEFORE J. E. CAMPBELL, SPECIAL MASTER, ON JANUARY 30, 1934, PURSUANT TO DECREE OF REFERENCE ENTERED DECEMBER 12, 1933—Filed Aug. 6, 1934

To the Honorable George W. McClintic, Judge of said Court:

And now come J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, and Hecla Coal and Coke Company, Appellees, by Edward W. Knight, Esq., and Alexander J. Barron, Esq., their solicitors, appearing specially for the sole purpose hereinbefore in this cause set forth, and object to the Appellants' Statement of Essential Parts of Evidence and Proceedings at a hearing [fol. 42] held at Charleston, West Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to Decree of Reference entered December 12, 1933, in the above cause, and respectfully request your Honorable Court not to approve the said Statement for the following reasons:

(1) The evidence from which the said Statement is taken is not filed in, or made a part of the record in this cause.

(2) The Proofs of Claim referred to in the Statement of Evidence were not on or before February 19, 1934, nor

have they at any time since been returned to this Court and filed by the said Special Master in this cause or made a part of the record in this cause.

(3) The Special Master has not yet completed the performance of his duties under the Decree of Reference entered December 12, 1933, and no report thereon has been filed in and made a part of the record in this cause.

Edward W. Knight, Alexander J. Barron, Solicitors for Appellees, J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appearing Specially for the Sole Purpose Hereinbefore Set Forth in This Cause and for No Other Purpose.

[fol. 43] IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

[Title omitted]

STATEMENT OF ESSENTIAL PARTS OF EVIDENCE AND PROCEEDINGS AT A HEARING HELD AT CHARLESTON, WEST VIRGINIA, BEFORE J. E. CAMPBELL, SPECIAL MASTER, ON JANUARY 30, 1934, PURSUANT TO DECREE OF REFERENCE ENTERED DECEMBER 12, 1933—Filed Aug. 6, 1934

Evidence of Thomas Watson: The witness lives at Pittsburgh, Pennsylvania, is an attorney-at-law and secretary of Thompson Connellsville Coke Company and the Hecla Coal and Coke Company, and is a director of each of them. The Hecla Coal and Coke Company is a common and preferred stockholder of Tower Hill Connellsville Coke Company of West Virginia, owning 2,037 shares of the preferred stock of the latter company, evidenced by certificates of stock which the witness filed, and 2,451 shares of the common stock, evidenced by certificates of stock which the witness filed, all of said certificates being in the name of the Hecla Coal and Coke Company. The Hecla Coal and [fol. 44] Coke Company is the sole owner of these shares

which are not pledged. Proof of claim of Hecla Coal and Coke Company, marked "Proof of Claim of Hecla Coal and Coke Company as the Owner of Shares of the Preferred Stock and the Company Stock of the Tower Hill Connellsville Coke Company of West Virginia", was filed in connection with the witness' testimony.

Examination of Witness John T. Wilson by Thomas Watson: Mr. Wilson was asked by Mr. Watson if he had examined the books of the Tower Hill Connellsville Coke Company of West Virginia to see whether they showed any indebtedness due from that Company to J. H. Hillman, Jr., the witness answering in the affirmative and stating that the books showed that the Company owed J. H. Hillman, Jr., salary for the month of October, 1933, in the amount of $250.00. Mr. Watson asked the witness if he had examined the books of the Company to see what they showed in regard to any indebtedness due to Thomas Watson, the witness answering in the affirmative and stating that the books showed that there was due to Thomas Watson salary for the month of October, 1933, in the amount of $250.00. Mr. Watson tendered, and there was filed, the proof of claim of Thomas Watson, marked "Proof of Claim of Thomas Watson", for professional services rendered, showing a balance of $33,750.00. He also tendered, and there was filed, proof of claim of Hillman Coal and Coke Company, marked "Proof of Claim of Hillman Coal and Coke Company", for office expense and general overhead for the month of October, 1933, amounting to $2,-720.03. He also tendered, and there was filed, proof of claim of J. H. Hillman, Jr., and A. B. Sheets, as sureties upon the supersedeas bond filed on the appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the decree of the District Court of the United States for the Southern District of West Virginia, said proof of claim being marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company".

[fol. 45] IN UNITED STATES DISTRICT COURT

No. 1434

In Equity

[Title omitted]

NOTICE OF LODGMENT

To Edward W. Knight, Esq., and Alexander J. Barron, Esq., Attorneys for J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appellees:

You are hereby notified that the Appellants, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, have prepared and lodged in the office of the Clerk of the District Court of the United States for the Southern District of West Virginia, a statement of the essential parts of the evidence and proceedings in the above entitled cause, at a hearing held at Charleston, West Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to a decree of reference entered December 12, 1933, for your examination and the examination of any other parties in interest. A copy of said statement is attached hereto.

You are further notified that we will ask the Court or the Judge to approve said statement on August 13th, 1934, at 2 o'clock, P. M., or as soon thereafter as the attention of the Court of the Judge can be had, at the farm of the [fol. 46] Honorable George W. McClintic near Marlinton, West Virginia.

Edwin W. Smith, Williamson M. Robinson, E. C. Higbee, Arthur S. Dayton, Attorneys for Appellants.

July 30, 1934.

July 30th, 1934, service of the foregoing notice is hereby accepted and receipt of a copy thereof and of the statement referred to therein is hereby acknowledged.

Edward W. Knight, Attorney for Appellees, appearing specially for the sole purpose hereinbefore set forth in this cause and for no other purpose.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA

In Equity

No. 3370

A. S. ALEXANDER, H. D. RUMMEL AND GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation.

ANCILLARY BILL OF COMPLAINT—Filed Feb. 19, 1934

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

A. S. Alexander, H. D. Rummel and George S. Baton as Receivers of Tower Hill Connellsville Coke Company of [fol. 47] West Virginia, a corporation (hereinafter called "Receivers" and "Tower Hill" respectively) bring this, their Ancillary Bill of Complaint, against J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal Company, a corporation (hereinafter called respectively "Hillman", "Sheets", "Watson", "Hillman Company" and "Hecla" and together hereinafter sometimes referred to as "Defendants"), and for their cause of action the Receivers state:

1. In a case pending in your Honorable Court at No. 1434 in Equity, wherein Piedmont Coal Company, a corporation and others are plaintiffs and Tower Hill is defendant (hereinafter referred to as the "Primary Cause"), your Honorable Court, on August 25, 1932, entered its decree (hereinafter referred to as the "Primary Decree"), wherein and whereby it ordered, adjudged and decreed, inter alia, that the business and affairs of Tower Hill be terminated and wound up, that its properties and assets be sold and converted into money and that distribution thereof be made to its creditors and stockholders according to

their respective rights and priorities, and in order to effect said termination and winding up and the sale, conversion and distribution of said properties and assets, the Receivers were appointed as Receivers of all the properties and assets of Tower Hill of whatsoever character and wheresoever situate, and were particularly authorized, empowered and directed, among other things, to have, take and receive all said properties and assets of Tower Hill and to institute and prosecute all suits and proceedings necessary to recover possession of all and singular said properties and assets and every part thereof and otherwise to effectuate the provisions of said decree, and thereupon the Receivers qualified as such Receivers in accordance with the provisions of said decree and since then have been and are now engaged in the exercise of the authorities and the discharge of the duties of their appointment. By reference, the record of the Primary Cause, and particularly the Primary Decree, are made a part hereof with like effect as if herein set out in extenso, and this Bill of Complaint is filed as ancillary thereto and for the purpose of effectuating the provisions of the Primary Decree.

[fol. 48] 2. By decree of your Honorable Court entered in the Primary Cause on December 12, 1933, J. E. Campbell, Esq., was appointed Special Master in Chancery to take, state and report an account showing all the debts, obligations and claims against Tower Hill, the owners of its preferred and common stock and such other matters as said Master may deem pertinent.

3. At a hearing held by said Master in Charleston, West Virginia, on January 30, 1934, the Defendants each appeared and made proof of certain claims wherein and whereby they asserted and attempted to establish a right to participate in the distribution of the funds in or to come into the hands of the Receivers, each of which remains pending and undetermined, the nature whereof is as follows:

(a) Hillman claims $250.00 as salary as President of Tower Hill for the month of October, 1933:

(b) Watson claims $250.00 as his salary as Secretary of Tower Hill for the month of October, 1933, and the sum of $33,500.00 as a balance for professional services asserted to have been rendered by him to Tower Hill;

(c) Hillman and Sheets claim the sum of $105,000.00 as sureties upon the supersedeas bond filed on the appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the Primary Decree;

(d) Hillman Company claims the sum of $2,720.03 on account of what it asserts is Tower Hill's share of expense pools consisting of various operating, engineering, general office and sales offices expenses, which, by some sort of an arrangement, of which Receivers do not have knowledge, were apportioned by the Hillman Company as Pool Manager among a large number of corporations owned or controlled by Hillman and Sheets, of which Tower Hill was one; and

(e) Hecla claims to be the owner of 2,037 shares of the preferred stock and 2,451 shares of the common stock of Tower Hill.

[fol. 49] The Receivers deny the claims of Hillman, Watson, Hillman and Sheets, and Hillman Company and have objected thereto before the Special Master, and deny the right of Hecla to participate and share in the said distribution. The validity of said claims and the respective rights, obligations and liabilities of the Receivers and the Defendants can be ascertained only by an adjudication not only of said claims but also of claims, hereinafter stated in detail, asserted by the Receivers against the Defendants, and this Ancillary Bill is filed in order that each and all of said claims—those so asserted by the Defendants as well as those, hereinafter set forth, asserted by the Receivers—may be together considered and adjudicated by your Honorable Court and thereby the respective rights, obligations and liabilities of the Receivers and the Defendants may be finally and conclusively determined.

4. Continuously since May, 1920, Hillman, Sheets and Watson have been directors of Tower Hill and of Tower Hill Connellsville Coke Company, a corporation created under the laws of Pennsylvania (hereinafter called "Tower Hill of Pennsylvania"), all of whose stock is, and during all said period was, owned by Tower Hill. Continuously since June, 1920, they have also been directors of Eastern Coke Company, also a corporation created under the laws of Pennsylvania (hereinafter called "Eastern Coke"), a majority of whose stock originally and later all, was owned by

Tower Hill of Pennsylvania. In August, 1929, Eastern Coke conveyed and transferred all its property of every kind to Tower Hill of Pennsylvania and in January, 1930, Tower Hill of Pennsylvania conveyed and transferred all its property of every kind to Tower Hill, so that, upon the appointment of the Receivers, all rights and interests of said three corporations became vested in the Receivers. Continuously during said respective periods Hillman was President, Sheets Vice President or Treasurer, and Watson Secretary of each of said three corporations, and a majority of the directors of each were the same persons and were the nominees and, for all practical purposes, merely the employees of Hillman. Hillman, through the medium of intermediate stock ownership, indirectly controlled the majority stock of Tower Hill, absolutely dictated the poli- [fol. 50] cies, management and business of each of said corporations, and completely dominated their affairs. Sheets and Watson, as directors and officers of each of said three corporations, acquiesced in and approved of such domination and lent their assistance to carrying it into effect.

5. From January, 1930, to June, 1930, both inclusive, Hillman as President, Sheets as Vice President or Treasurer, and Watson as Secretary of Tower Hill, each with the knowledge and without the objection of the others, under the guise of salaries as such officers, severally drew out of its funds large sums of money, to-wit, Hillman $500.00 per month, Sheets $500.00 per month and Watson $250.00 per month; and from July, 1930, to September, 1933, both inclusive, they severally in like manner drew out of the funds of Tower Hill $250.00 per month. Said withdrawals were not authorized by any corporate action, and the Receivers are advised and therefore charge that all such withdrawals were and are illegal and unlawful disbursements and appropriations of the funds of Tower Hill. During the said period Tower Hill was doing substantially no business, the services rendered were little more than nominal, and the amounts of the withdrawals were extravagant, unreasonable and wholly disproportionate to the worth of any services rendered by said officers or any of them. The Receivers are advised and therefore charge that Hillman, Sheets and Watson are liable to the Receivers for the repayment of all sums of money so illegally received by them

respectively, and for such repayment demand is hereby made.

6. From May, 1920, to December, 1929, Hillman, Sheets and Watson, each with the knowledge and without the objection of the others, monthly drew out of the funds of Tower Hill of Pennsylvania large sums of money under guise of salaries as President, Vice President or Treasurer, and Secretary, respectively. Such withdrawals were not authorized by any corporate action, and the Receivers are advised and therefore charge that all such withdrawals were and are illegal and unlawful disbursements and appropriations of the funds of Tower Hill of Pennsylvania. The amounts so withdrawn were extravagant, unreasonable [fol. 51] and wholly disproportionate to the worth of any services rendered by said officers or any of them. The right to recover the amounts so unlawfully withdrawn from Tower Hill of Pennsylvania has become vested in the Receivers in the manner hereinbefore stated and for the repayment thereof the Receivers are advised and therefore charge that Hillman, Sheets and Watson are liable, and for such repayment demand is hereby made.

7. From July, 1920, to August, 1929, Hillman, Sheets and Watson, each with the knowledge and without objection of the others, monthly drew out of the funds of Eastern Coke large sums of money under the guise of salaries as President, Vice President or Treasurer, and Secretary, respectively. Such withdrawals were not authorized by any corporate action, and the Receivers are advised and therefore charge that all such withdrawals were and are illegal and unlawful disbursements and appropriations of the funds of Eastern Coke. The amounts so withdrawn were extravagant, unreasonable and wholly disproportionate to the worth of any services rendered by said officers or any of them. The right to recover the amounts so unlawfully withdrawn from Eastern Coke has become vested in the Receivers in the manner hereinbefore stated and for the repayment thereof the Receivers are advised and therefore charge that Hillman, Sheets and Watson are liable, and for such repayment demand is hereby made.

8. On or about July 30, 1930, Hillman caused Tower Hill to draw and deliver to Emerald Coal & Coke Company, a corporation of the State of Delaware (hereinafter

called "Emerald"), its voucher for $1,150,000.00, and on or about August 3, 1930, its second voucher for $34,000.00. At or about that time there was delivered to Tower Hill, and there is now in possession of the Receivers, a certificate purporting to represent 11,840 shares of the capital stock of Emerald of the par value of $100.00 each and aggregating at par $1,184,000.00. Each of said vouchers was in due course paid out of the funds of Tower Hill. Said transaction and the drawing and payment of both of said vouchers were unauthorized and were had and done without any corporate action whatsoever. Sheets and Watson knew of said transaction and of the issuance and delivery [fol. 52] of said vouchers at the time thereof, made no objection or protest and took no action to protect the interests of Tower Hill.

9. In order to raise funds to pay said vouchers, Hillman caused Tower Hill to sell high-grade income producing securities, for the most part at substantial losses, whereby the income of Tower Hill was greatly reduced. Sheets and Watson knew of said sales, made no objection or protest and took no action to protect the interests of Tower Hill.

10. At the time of said transaction, the stock of Emerald had never paid any dividends, gave no signs of ability so to do within any reasonable time in the future, and was wholly without any market value and of doubtful intrinsic worth. The sole asset of Emerald, aside from an insignificant amount of cash, was 100 shares of the capital stock of Emerald Coal Company, a Pennsylvania corporation, being all the outstanding shares of that Company. Substantially the only asset of Emerald Coal Company was something less than 10,000 acres of undeveloped coal in Greene County, Pennsylvania, which it had been carrying for twenty-five years and upwards. Emerald and its subsidiary, Emerald Coal Company (hereinafter collectively referred to as "Emerald"), had a mortgage indebtedness of $875,000.00 held by banking interests with which Hillman was connected, and outstanding notes in excess of $430,000.00 for moneys loaned by its stockholders. Emerald never had any gross income; the carrying charges of the property, aggregating more than $2,000,000.00, had been provided by its original stockholders in part by loans and in part by the purchase of additional shares; to maintain

the book value of its stock at par these enormous carrying charges were capitalized; it was in a precarious financial condition. Said tract of coal was not marketable and Emerald did not have and had no means of acquiring the funds necessary for its development. If it had been developed, it could not have been profitably operated.

11. At the time said transaction was entered into and the moneys of Tower Hill so expended, Hillman was obligated on a personal contract with Emerald to purchase 9,000 shares of Emerald stock for $900,000.00, and said transac- [fol. 53] tion was shifted to Tower Hill by Hillman in relief of his own liability and in discharge of his own obligation. Sheets and Watson knew of Hillman's personal obligation, made no objection or protest to the shift of it to Tower Hill and took no action whatever to protect Tower Hill's interests.

12. Said transaction was consummated at a time when Hillman, Sheets and Watson were fully advised of the intention of plaintiffs in the Primary Cause to file an Amended and Supplemental Bill charging fraudulent mismanagement of Tower Hill and praying for the winding up of its business and affairs. It was effectuated without any notice to your Honorable Court or to the plaintiffs in the Primary Cause, and it did not come to their knowledge until more than fourteen months after the transaction had been fully consummated.

13. The funds of Tower Hill were so expended in said Emerald transaction through the dominating influence and absolute control of Hillman in the affairs of Tower Hill, and all the facts were known to Sheets and Watson, who notwithstanding made no objection or protest and took no action to protect the interests of Tower Hill. The expenditure of said funds was, Receivers are advised, a misappropriation of the moneys and assets of Tower Hill, was made for the monetary gain and advantage of Hillman and to exonerate him from the obligations of a personal contract, and constitutes mismanagement of the corporate affairs of Tower Hill of a gross and fraudulent character.

14. Receivers are advised and therefore charge that Hillman, Sheets and Watson are legally liable to make good the funds of Tower Hill dissipated and misapplied in the

acquisition of the Emerald stock. Receivers being in possession of said shares, are ready and willing to return them to Hillman, Sheets and Watson, or any of them, upon their making good the funds so fraudulently dissipated with interest, and hereby demand therefor is made.

15. Hillman, Sheets and Watson are, and during all the times mentioned in the record in the Primary Cause and herein were, directors of Tower Hill, Hillman Company [fol. 54] and Hecla, and a number of other corporations the names of all of which are not known to Receivers but some of which they believe to be Hillman Transportation Company, Hillman Supply Company, Thompson-Connellsville Coke Company, Fayette Investment Company, Orenda Coal Company, General Water Company and Vulcan Real Estate Company, Hillman being President, Sheets Vice President or Treasurer and Watson Secretary of each of them. The majority directors and officers of Tower Hill, Hillman Company, Hecla and all said other corporations were the same persons and were the nominees and for practical purposes merely the employees of Hillman. He was the controlling head and dominating influence in all said corporations. Their principal offices were in the First National Bank Building, Pittsburgh, Pennsylvania, in the same suite in which were the private offices of Hillman, Sheets and Watson used by them in the conduct of their personal affairs, and also the principal offices of a number of other corporations controlled and dominated by Hillman. In the conduct of the affairs and the transaction of the business of said corporations and individuals, numerous persons were employed in common as assistants, stenographers, accountants, bookkeepers and clerks. The compensation of all such employees, the rent of said suits of offices and the other expenses incident to the conduct of said various businesses in said suite were paid by the Hillman Company under some sort of a pool arrangement and by it, as the pool manager and under the supervision of the individual Defendants, were apportioned among the various corporations referred to or some of them, including Tower Hill, in such respective amounts as Hillman and Sheets from time to time determined. So far as Receivers are advised, no part of said expenses has been charged against Hillman, Sheets or Watson or any other individuals occupying said offices and using said facilities.

During all said times the Hillman Company also maintained a sales department with offices not only in said suite in Pittsburgh, Pennsylvania, but in various other places, in and from which employees were engaged. The compensation of all such employees, the rent of all such sales offices and the other expenses incident to the operation of said sales department were in like manner apportioned among said corporations, or some of them, including Tower Hill, [fol. 55] by the Hillman Company as pool manager and in accordance with directions from time to time given by Hillman, Sheets and Watson.

The Hillman Company also maintained what it termed an operating department, consisting of various operating employees, and an engineering department, in which were employed a number of engineers. The compensation of all such employees and all the expenses incident to the performance of their work were likewise apportioned among said corporations, or some of them, including Tower Hill, by the Hillman Company as pool manager and in accordance with directions from time to time given by Hillman, Sheets and Watson.

16. Said Claim of the Hillman Company for $2,720.03, filed with said Special Master in the Primary Cause (being marked "Exhibit Hillman Coal & Coke Company Proof of Claim"), is Tower Hill's apportionment of said expense pools mentioned in the preceding paragraph hereof for the month of October, 1933, as made by the Hillman Company under the direction of Hillman, Sheets and Watson.

17. On account of said apportionments of said expense pools referred to in paragraph 15 hereof, Tower Hill from time to time made large payments, the aggregate whereof, considering the nature, character and extent of its business, far exceeded the fair, reasonable and conscionable expenditures for such purposes and constituted improvident, exorbitant, unnecessary and fraudulent waste and misappropriation of the moneys and funds of Tower Hill. All this was done, as Receivers believe and charge, for the benefit of the individual Defendants in the conduct of their personal affairs and also for the advantage of some of the other corporations in which they had larger interests and greater concern, and was a manipulation of the business and affairs of Tower Hill to its detriment and loss and that of its stockholders, and for the monetary gain and aggran-

dizement of the individual Defendants and their associated and allied interests.

18. The extent of the operations and business of Tower Hill never justified the expenses for which it was charged by said apportionments. A small office and a limited [fol. 56] amount of sales, clerical and operating service were all that it required for every legitimate need of its business, and the expenses incident thereto ought to have cost only a small portion of the sums actually expended by this apportionment method. If the welfare of Tower Hill and its stockholders had been alone consulted, much less expense would have been incurred, but as it was, the business of Tower Hill was conducted as a department of the larger Hillman enterprises, for the purpose and with the result of casting upon Tower Hill an unjust proportion of the total cost and imposing upon it an excessive cost of carrying on its business.

19. No corporate action adopting, ratifying or approving said method of conducting the business of Tower Hill, as hereinbefore set forth, was ever taken, and the practice was established and pursued and the payments made at the instance and by the dominating influence of Hillman, who through the medium of intermediate stock ownership indirectly controlled the majority of stock of Tower Hill, absolutely dictated its policy, management and business and was in effect the corporation itself; and Sheets, as Director and Vice President or Treasurer, and Watson as Director and Secretary of Tower Hill, participated in said practice and payments and took no action to protect Tower Hill against said unlawful and fraudulent impositions.

20. Hillman, Sheets and Watson, as directors and officers of Tower Hill, failed and neglected to discharge their duties in respect of said payments, to protect the interests of Tower Hill, to regard and perform their duties as trustees for its minority stockholders, and to act with the good faith their duties, obligations and trusts required and demanded. In consequence whereof, Tower Hill lost large sums of money, the full amount of which can be determined only by a full and complete accounting, but which greatly exceeds the amount of the Hillman Company's said claim in the Primary Cause.

21. For the payment of such moneys as upon said accounting it may be decreed were improvidently, unlawfully and fraudulently paid out of the funds of Tower Hill, the individual Defendants and the Hillman Company are liable, and demand for such accounting and repayment is hereby made.

[fol. 57] 22. Said practice of apportioning said expense pools began as regards Tower Hill about January 1, 1930, and continued to and including October, 1933, but prior thereto and from April, 1920, to and including December, 1929, there existed a like practice as regards Tower Hill of Pennsylvania. Said practice, as regards Tower Hill of Pennsylvania, was of the exact character and with the same injurious result and want of justification as herein averred in the case of Tower Hill, was without any corporate authorization or ratification, was with and for the same false and fraudulent intent and purpose as in the case of Tower Hill, and was in like manner actuated and dictated by Hillman and participated in by Sheets and Watson. The right to demand an accounting of and to recover said unlawful payments, as herein already stated, is now vested in the Receivers. The amount of such unlawful payments can be determined only by a full and complete accounting.

23. For the repayment of such moneys as upon said accounting it may be decreed were improvidently, unlawfully and fraud-ently paid out of the funds of Tower Hill of Pennsylvania, the individual Defendants and Hillman Company are liable to the Receivers, and demand for such accounting and repayment is hereby made.

24. From June, 1920, to August, 1929, a like practice of apportioning said expense pools prevailed as regards Eastern Coke. Said practice, as regards Eastern Coke, was of the exact character and with the same injurious result and want of justification as herein averred in the case of Tower Hill, was without any corporate authorization or ratification, was with and for the same false and faudulent intent and purpose and was in like manner actuated and dictated by Hillman and participated in by Sheets and Watson. The right to demand an accounting of and to recover said unlawful payments, as herein already stated, is now vested in

the Receivers. The amount of all such unlawful payments can be determined only by a full and complete accounting.

25. For the repayment of such moneys as upon said accounting it may be decreed were improvidently, unlawfully and fraudulently paid out of the funds of Eastern Coke, the [fol. 58] individual Defendants and Hillman Company are liable to the Receivers, and demand for such accounting and repayment is hereby made.

26. During the period from April, 1920, to October, 1933, the business of Tower Hill and of its subsidiaries, Tower Hill of Pennsylvania and Eastern Coke, all of whose properties and rights are now vested in the Receivers, was the mining of coal and the manufacture of coke from properties in Fayette County, Pennsylvania. All the coal produced and coke manufactured from said properties during said period, at the instance of Hillman and with the acquiescence and approval of Sheets and Watson, were taken and disposed of by the Hillman Company. Upon the appointment of the Receivers, they received from Hillman, Sheets and Watson certain books and records which were said by them to be all the books and records of Tower Hill and its subsidiaries. Said books do not disclose, and the Receivers are not advised of, the amounts of coal produced and coke manufactured from said properties during the several months and years of said period, or to whom, in what manner, for what price, and upon what terms and conditions they may have been sold or otherwise disposed of. From these records it would appear that certain amounts were monthly paid by the Hillman Company to Tower Hill and its subsidiaries, but said records wholly fail to show, and the Receivers are without information, whether said coal and coke were sold by Tower Hill and its subsidiaries to the Hillman Company and, if so, the amount of the tonnage and the amount and adequacy of the price, or whether such coal and coke were sold by the Hillman Company for the account of Tower Hill and its subsidiaries and, if so, what commission or compensation was received or deducted by the Hillman Company, or to whom and upon what contracts such coal and coke were delivered.

The Receivers are informed, but are without complete knowledge, that said coal and coke were apportioned upon and among contracts taken by the Hillman Company, but they are wholly without knowledge of the facts necessary to

determine the propriety and fairness of such allocation and apportionment. The Receivers are advised and believe, and therefore charge, that it cannot be determined whether [fol. 59] the Hillman Company has fully and properly accounted for all such coal produced and coke manufactured from said properties during said period unless a full and complete accounting be judicially had and taken of all such coal and coke and the disposition thereof, and the Receivers are advised that as, during the whole of said period, a majority of the Board of Directors of the Hillman Company and of Tower Hill and its subsidiaries was composed of the same persons, and as all said companies were under the direction and domination of Hillman, they are entitled as a matter of right to such accounting.

27. The Receivers are advised and believe, and therefore aver, that Hillman, Sheets and Watson, as officers and directors of Tower Hill and its subsidiaries, failed and neglected to conduct the business of said corporations and to manage their affairs as independent going concerns, and in violation of their duties as directors and trustees for said corporations and their minority stockholders, caused and permitted Tower Hill and its subsidiaries to be operated as mere departments of the Hillman Company, in consequence of which wrongdoing, negligence and failure, Tower Hill and its subsidiaries lost large sums of money, for the payment of which, upon a proper accounting, the individual Defendants and the Hillman Company are liable. For such accounting and payment demand is hereby made.

28. In August, 1929, Hecla sold and conveyed to Redstone Coal and Coke Company (hereinafter called "Redstone"), a certain tract of coal land situate in Fayette County, Pennsylvania, consisting of about 2,000 acres and known as its Isabella Plant, at $2,000 per acre for the said tract of coal and an additional price, fixed by appraisement, for the developments, improvements and equipment on said tract.

29. As a condition of said purchase, Redstone insisted upon a certain minimum acreage, which was in excess of that owned by Hecla, and as a further condition, required that it be relieved of its coal mine and coke plant known as Thompson-Connellsville No. 1, in which there were 178.4 acres of unmined coal consisting of ribs, stumps and pillars,

incapable of being profitably mined and of little, if any, value.

[fol. 60] 30. In order to meet the said conditions and effect said sale by Hecla, and for its benefit, 48 acres of the coal of Tower Hill of Pennsylvania were conveyed to Redstone at a price of $2,000 per acre, and an additional 178.4 acres of its coal were conveyed to Redstone in exchange for which the said Thompson-Connellsville No. 1 plant was conveyed by Redstone to Tower Hill of Pennsylvania. The 178.4 acres of Tower Hill of Pennsylvania's coal so conveyed was of a value of at least $2,000 per acre.

31. Said sale and exchange stripped Tower Hill of Pennsylvania of its most desirable coal, and the result was that its remaining coal acreage was incapable of profitable operation and there was foisted upon it a practically worthless property.

32. The said exchange was caused to be made by Hillman through his domination and control of the business and affairs of Tower Hill of Pennsylvania, and the purpose of it was to benefit him and Hecla at the loss and expense of Tower Hill of Pennsylvania. The majority of the directors of Hecla and Tower Hill of Pennsylvania were the same persons, and Hecla, through its control of Fayette Investment Company and thereby of Thompson-Connellsville Coke Company, was the owner of the majority of the capital stock of Tower Hill, which in turn owned all the stock of Tower Hill of Pennsylvania. The transaction was to the great advantage and profit of Hillman and Hecla and Hillman's allied interests and to the great disadvantage and loss of Tower Hill of Pennsylvania and Tower Hill. If Tower Hill of Pennsylvania had been independently represented, it would not have exchanged said 178.4 acres of its coal for said plant, Thompson-Connellsville No. 1, but would have demanded and required that payment for said 178.4 acres be made in cash. Thus Hecla, in order to effectuate its said sale, would itself have had to take over said Thompson-Connellsville No. 1 plant instead of foisting that property upon Tower Hill of Pennsylvania. As it was, Hillman, through his domination and control of Tower Hill of Pennsylvania, willfully, wantonly and fraudulently sacrificed its properties and rights to enrich Hecla, in which he had larger interest and greater concern. The benefits,

[fol. 61] advantages and profits of the trancaction were accepted and enjoyed by Hecla.

33. Sheets and Watson had full knowledge of all the facts alleged in paragraphs 28 to 32 hereof, both inclusive, and made no objection to or protest against the said exchange but as officers and directors of Tower Hill of Pennsylvania, Tower Hill and Hecla, participated in the measures by which the said exchange was effected.

34. Tower Hill of Pennsylvania sustained further and additional serious losses in that since said transaction, Thompson-Connellsville No. 1 has been incapable of separate operation, the limited amount of coal mined therefrom has been through the Thompson-Connellsville No. 2 mine owned by Thompson-Connellsville Coke Company, and the large sums of money which have been expended in taxes, maintenance and improvements have greatly exceeded the gross receipts. Said expenditures were, under the circumstances, grossly improvident, have resulted in no value to Tower Hill of Pennsylvania or Tower Hill and were brought about by the fraud of Hecla and the individual Defendants in imposing Thompson-Connellsville No. 1 upon Tower Hill of Pennsylvania.

35. Receivers are advised and therefore charge that as against Tower Hill of Pennsylvania, with whose rights the Receivers are now vested, as herein already stated, said exchange was and is fraudulent and should be undone and Tower Hill of Pennsylvania, or Tower Hill, placed in the same situation that it would have been in if it had received the value of its said 178.4 acres of coal in cash instead of by a conveyance to it of said Thompson-Connellsville No. 1 plant; that the fair and rightful consideration for the 178.4 acres of coal so conveyed to Redstone in said exchange was not less than $2,000 per acre in cash; that in forcing Tower Hill of Pennsylvania to accept in lieu thereof the Thompson-Connellsville No. 1 plant, Hecla and the individual Defendants committed a fraud upon Tower Hill of Pennsylvania and on account thereof the Receivers are entitled to receive from Hecla and the individual Defendants the sum [fol. 62] of $356,800 with interest thereon from August 31, 1929; that the Receivers are also entitled to have a full and complete accounting of all moneys received on account of coal mined from the Thompson-Connellsville No. 1 property

and from the disposition of any other part of said property and of all moneys expended on account of said property by way of taxes, maintenance, improvements or otherwise, since August 31, 1929, and that the Receivers are entitled to receive all such moneys as upon such accounting it may be decreed should be paid to the Receivers by Hecla and the individual Defendants; and that upon the payment of all such sums of money, it will be the duty of Tower Hill and the Receivers to convey the Thompson-Connellsville No. 1 property to Hecla or to whomsoever may be lawfully entitled thereto. Tower Hill and the Receivers are ready and willing to make such conveyance upon such payment. For such accounting and payments demand is hereby made.

Wherefore, the Receivers, showing that said claims so asserted by Defendants before said Special Master in the Primary Cause cannot be adjudicated independently of a consideration of the claims herein asserted by the Receivers against the Defendants and the adjudication of all said claims of the Defendants and said claims of the Receivers against the Defendants in one proceeding is necessary for the effectual enforcement of the decree in the Primary Cause, pray:

1. That there may be adjudicated in this ancillary proceeding the respective rights, obligations and liabilities of the Receivers and the Defendants, and each of them, respecting any and all matters to which reference is made in this Ancillary Bill, including the claims of the respective Defendants referred to in paragraph 3 hereof, and that payments of moneys may be decreed to be made in accordance with such adjudication.

2. That the Defendants Hillman, Sheets and Watson, and each of them, may be required fully and accurately to account for all moneys received by them during the period May, 1920, to October, 1933, under the guise of salaries as officers of Tower Hill and/or Tower Hill of Pennsylvania and/or Eastern Coke, and that said Defendants, and each of [fol. 63] them, be decreed to repay to the Receivers all the said moneys; and that said Defendants, and each of them, be decreed to pay to the Receivers the further sum of $1,184,000.00, with interest thereon from August 3, 1930, upon the surrender by the Receivers of the above men-

tioned 11,840 shares of the capital stock of Emerald Coal & Coke Company.

3. That the Defendants Hillman, Sheets and Watson and the Defendant Hillman Company, and each of them, may be required fully and accurately to account for all moneys received or retained by Hillman Company from Tower Hill and/or Tower Hill of Pennsylvania and/or Eastern Coke on account of the pool arrangements by which Hillman Company attempted to apportion and allocate certain office, operating, sales, overhead, and engineering expenses between and among various corporations with which it was directly or indirectly connected or affiliated, including Tower Hill and its subsidiaries Tower Hill of Pennsylvania and Eastern Coke, and also of all coal produced and coke manufactured from the properties of Tower Hill and its subsidiaries, Tower Hill of Pennsylvania and Eastern Coke, during the period April, 1920, to October, 1933, and the proceeds of sale or other disposition thereof; and that said Defendants, Hillman, Sheets, Watson and Hillman Company, and each of them, be decreed to pay to the Receivers all such moneys as upon such accounting may be adjudicated to be due and owing to Tower Hill or the Receivers.

4. That the Defendants Hillman, Sheets and Watson and the Defendant Hecla, and each of them, be decreed to pay to the Receivers the sum of $356,800.00, with interest thereon from August 31, 1929, being the value in cash of the 178.4 acres of coal conveyed by Tower Hill of Pennsylvania to Redstone Coal & Coke Company in exchange for said Thompson-Connellsville No. 1 property, upon the conveyance by the Receivers of said Thompson-Connellsville No. 1 property to such person or persons as the Court may direct; and that said Defendants, and each of them, may be required fully and accurately to account for and repay to the Receivers all moneys of Tower Hill and/or Tower Hill of Pennsylvania expended for taxes upon and operation and maintenance of said Thompson-Connellsville No. 1 [fols. 64 & 65] property and/or the electrification thereof, improvements thereon, and machinery and equipment therefor, less, however, such moneys as have been heretofore received by Tower Hill and/or Tower Hill of Pennsylvania for coal produced and coke manufactured and sold from said Thompson-Connellsville No. 1 property.

5. For such other, further and additional relief as, upon such accountings and further proceedings in this Ancillary Cause or in said Primary Cause, it may be made to appear that justice and equity require.

George S. Baton, A. S. Alexander, H. D. Rummel, Receivers of Tower Hill Connellsville Coke Company of West Virginia; Edwin W. Smith, Arthur S. Dayton, E. C. Higbee, Wm. M. Robinson, Solicitors for Complainants.

Duly sworn to by A. S. Alexander et al. Jurats omitted in printing.

[fol. 66] IN UNITED STATES DISTRICT COURT

In Equity

No. 3370

[Title omitted]

ORDER FILING AFFIDAVIT ETC.—Feb. 19, 1934

This day came A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, by counsel and tendered and asked leave to file the affidavit of Ira H. Mottesheard, Clerk of this Court, that at the request and on behalf of the said Receivers the said Mottesheard had personally, on the 19th day of February, 1934, deposited in the United States mail, at Charleston, West Virginia, a true and correct copy of the bill of complaint in this ancillary cause; and copy of order entered on the 19th day of February, 1934, in the chancery cause pending in this Court, No. 1434 in Equity, or Piedmont Coal Company, et als, vs. Tower Hill Connellsville Coke Company of West Virginia, both certified by the Clerk of this Court, inserted in envelopes addressed to the following respective parties: J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, each at First National Bank Building, Pittsburgh, Pennsylvania, and each such envelope properly stamped and registered, and that the said affiant had personally on the 19th day of

February, 1934, delivered a copy of said order and said bill, likewise certified by the Clerk of this Court, at the office of E. W. Knight, Esq., in Charleston, West Virginia, which affidavit being seen and inspected by the Court is now here ordered filed.

[fol. 67] IN UNITED STATES DISTRICT COURT

In Equity

No. 3370

[Title omitted]

AFFIDAVIT OF IRA H. MOTTESHEARD, CLERK—Filed February 19, 1934

STATE OF WEST VIRGINIA,
County of Kanawha, ss:

This day personally appeared before me, a Notary Public in and for the county and state aforesaid, Ira H. Mottesheard, who being by me first duly sworn, deposes and says that he is Clerk of the District Court of the United States for the Southern District of West Virginia, in which said Court an ancillary bill of complaint in the above entitled cause was filed by order entered by said Court on the 19th day of February, 1934, in the chancery cause of Piedmont Coal Company, et als., plaintiffs, vs. Tower Hill Connellsville Coke Company of West Virginia, Defendant, No. 1434 in Equity. Affiant further says that at the request and upon behalf of A. S. Alexander, H. D. Rummel and George S. Baton, Receivers, plaintiffs in the above entitled cause, and in accordance with said order, this affiant personally, on the 19th day of February, 1934, deposited in the United States mail, at Charleston, West Virginia, a true and correct copy of said order and of said ancillary bill of complaint of A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, vs. J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Com-
[fol. 68] pany, certified by this affiant as Clerk of said

Court as aforesaid, inserted in envelopes addressed to the following respective parties: J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, and Hecla Coal and Coke Company, each at First National Bank Building, Pittsburgh, Pennsylvania, and affiant further says that each such envelope was properly stamped and registered. Affiant further says that on the 19th day of February, 1934, this affiant personally delivered a copy of said order and said ancillary bill, each likewise certified by this affiant as Clerk of said Court as aforesaid, at the office of E. W. Knight, Esq., in Charleston, West Virginia.

Ira H. Mottesheard.

Taken, subscribed and sworn to before me this 19th day of February, 1934.

(Notarial Seal.)

Carrie Davis, Notary Public in and for the County and State aforesaid.

My commission expires July 6th, 1942.

IN UNITED STATES DISTRICT COURT

In Equity

No. 3370

[Title omitted]

MOTION TO QUASH SERVICE AND TO DISMISS BILL FOR WANT OF JURISDICTION

[fol. 69] To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation, defendants herein, each by his or its attorney, appears herein specially for the sole purpose of making this motion to question the jurisdiction of the Court in this proceeding and for said purpose only moves the Court to quash the service

of a copy of the order entered by this court in the case of Piedmont Coal Company and others against Tower Hill Connellsville Coke Company of West Virginia, No. 1434 in Equity, and a copy of the Bill of Complaint filed at the above Number in Equity and therein designated as "Ancillary Bill of Complaint" and to dismiss said Bill for want of jurisdiction on the following grounds:

(1) No legal service of process has been made on any of the defendants in this proceeding and this Court has no jurisdiction in rem or in personam of any of the defendants to said Bill.

(2) It does not appear of record that any of the defendants are citizens or inhabitants of, or residents in, or were to be found within, the Southern District of West Virginia at the time of the filing of the said Bill of Complaint.

(3) Each of the individual defendants at the time of the filing of the said Bill of Complaint and of the mailing of a copy of the said Bill to him and for many years prior thereto was a citizen and inhabitant of the Commonwealth of Pennsylvania and a resident of the City of Pittsburgh, Allegheny County, in said Commonwealth, and was not to be found either within the Southern District of West Virginia or within the State of West Virginia; and at no time since the filing of the said Bill have any of the said defendants been a citizen, inhabitant or resident of, or to be found within, the said Southern District of West Virginia, or State of West Virginia.

[fol. 70] (4) Hillman Coal and Coke Co[illegible] and Hecla Coal and Coke Company is each a corporation incorporated under the laws of the Commonwealth of Pennsylvania, having its domicile in the City of Pittsburgh, County of Allegheny in said Commonwealth, and neither of said corporations owns or possesses any property within the Southern District of West Virginia, or is registered to do business within said State of West Virginia or has an agent therein for the service of process upon it, or does any business therein.

E. W. Knight, Brown, Jackson & Knight, Alter, Wright and Barron, Attorneys for the aforesaid defendants appearing specially for the sole purpose aforesaid.

In United States District Court

In Equity

No. 3370

A. S. Alexander, H. D. Rummerl and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation,

vs.

J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation.

Decree—July 30, 1934

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

(1) That the memorandum decision of this Court, marked "Memorandum Decision" and prepared by the Court after submission of this cause, be and the same is hereby amended by including therein the following finding [fol. 71] pursuant to the stipulation of Counsel for Plaintiffs and Defendants made on the argument of the said cause, to-wit, that on or before February 19, 1934, neither the said J. H. Hillman, Jr., A. B. Sheets nor Thomas Watson was an inhabitant of the Southern District of West Virginia, but each of said individual defendants on or before said date was, ever since has been and now is a citizen of the Commonwealth of Pennsylvania, a resident of the City of Pittsburgh in said Commonwealth and an inhabitant of the Western District of Pennsylvania; and that on or before said date neither Hillman Coal and Coke Company nor Hecla Coal and Coke Company was an inhabitant of the Southern District of West Virginia, but each of said corporate defendants on or before said date was, ever since has been and now is a corporation created, organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office or place of business in said City of Pittsburgh and a citizen and resident of said Commonwealth and an inhabitant of the Western

District of Pennsylvania and that neither of said corporations on or after said date had or has had a place of business in or transacted any business within the State of West Virginia.

(2) That the said Memorandum Decision as amended be and hereby is filed and made part of the record in this cause.

(3) That for the reasons stated in said Memorandum Decision as amended Defendants' motion entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction," filed March 19, 1934, be, and hereby it is sustained and the Bill of Complaint entitled "Ancillary Bill of Complaint" filed February 19, 1934, in this cause and referred to in said Motion be and hereby it is dismissed for want of jurisdiction over the persons of the Defendants, but this decree is without prejudice to A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, to assert the matters of fact and to seek the remedies set out in said Bill of Complaint in any court having jurisdiction.

(4) That Defendants shall recover their costs accrued upon said Bill of Complaint and said Motion.

[fol. 72] Thereupon Plaintiffs, by counsel, excepted to the judgment and decree of the Court, which exception is allowed and at their instance a bill is sealed.

IN UNITED STATES DISTRICT COURT

In Equity

No. 3370

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed July 30, 1934

And the said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke

Company of West Virginia, a corporation, assign the following errors in the record and proceedings in said cause:

(1) The District Court of the United States for the Southern District of West Virginia erred in entering its decree of July 30, 1934.

(2) Said Court erred in sustaining the motion of Defendants filed March 19, 1934, and marked "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction."

(3) Said Court erred in not overruling said motion.

(4) Said Court erred in dismissing the Ancillary Bill of Complaint for want of jurisdiction.

(5) Said Court erred in entering its decree of July 30, 1934, at No. 1434 in Equity (known as the "Primary Cause"), sustaining the motion filed therein March 19, 1934, and vacating the order entered therein February 19, 1934.

[fol. 73] (6) Said Court erred in refusing to adjudge and decree that it had jurisdiction of this ancillary cause and of the persons of Defendants, and in failing and refusing further to consider this cause and upon such consideration to grant relief as prayed for in said Ancillary Bill of Complaint.

For which errors, said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers, pray that said decree of the United States District Court for the Southern District of West Virginia, entered July 30, 1934, in the above entitled cause, be reversed and the cause remanded with directions to overrule said motion and to re-instate said Ancillary Bill of Complaint, and for such other and further relief as may be proper in the premises.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton.

IN UNITED STATES DISTRICT COURT

STIPULATION TO PREPARE TRANSCRIPT OF RECORD AND PRINT SAME UNDER RULE 23 OF THE UNITED STATES CIRCUIT COURT OF APPEALS—Filed August 6, 1934

PIEDMONT COAL COMPANY, a Corporation, and G. S. HARAH, EDGAR S. HACKNEY and J. E. HESS

versus

TOWER HILL CONNELLSVILLE COKE COMPANY OF WEST VIRGINIA, a Corporation

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va., and that it be printed under the supervision of the Clerk of that Court, in accordance with Rule 23.

Arthur S. Dayton, Counsel for Appellants. Edward W. Knight, Counsel for Appellees.

August 3, 1934.

[fol. 74] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL

(Filed July 30, 1934

ORDER ALLOWING APPEAL

(Entered of Record July 30, 1934)

BOND ON APPEAL

(Executed by A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, as principals, and United States Fidelity and Guaranty Company, a corporation, as surety, in the sum of Two Hundred Dollars, and conditioned to prosecute appeal to effect and answer all costs. Dated July 30, 1934, and approved and filed as of the same date.)

CITATION.

(Issued July 30, 1934, and returnable at Richmond within forty days from the date thereof. Service accepted thereon as of the 30th day of July, 1934.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 75] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3736

A. S. ALEXANDER, H. D. RUMMEL AND GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Appellants,

versus

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and Hecla Coal and Coke Company, a Corporation, Appellees

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston. In Equity

DOCKET ENTRIES

August 14, 1934, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond and citation are certified up under section 7 of Rule 14.

Same day, the appearance of Arthur S. Dayton is entered for the appellants.

August 21, 1934, the special appearance, for the sole purpose of raising the question of jurisdiction, of Geo. E. Alter, [fol. 76] Alexander J. Barron and Edward W. Knight is entered for the appellees.

August 24, 1934, twenty-five copies of the printed record are filed.

September 29, 1934, the appearance of Edwin W. Smith, E. C. Higbee, William M. Robinson and Arthur S. Dayton is entered for the appellants.

Argument of Cause

October 12, 1934 (October term, 1934,) cause came on to be heard, together with No. 3737, before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

In United States Circuit Court of Appeals, Fourth Circuit

No. 3736

A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Appellants,

versus

J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a Corporation, and Hecla Coal and Coke Company, a Corporation, Appellees

[fol. 77] No. 3737

A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporaton, Appellants,

versus

J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a Corporation, and Hecla Coal and Coke Company, a Corporation, Appellees

Appeals from the District Court of the United States for the Southern District of West Virginia, at Charleston

Argued October 12, 1934. Decided January 22, 1935

Before Parker, Northcott and Soper, Circuit Judges

E. C. Higbee and Arthur S. Dayton (Edwin W. Smith and Wm. M. Robinson on brief) for Appellants, and E.

W. Knight (George E. Alter and Alexander J. Barron on brief) for Appellees.

OPINION—Filed Jan. 22, 1935

NORTHCOTT, Circuit Judge:

These are appeals from two decrees entered in the District Court of the United States for the Southern District of West Virginia, one of which was entered in a suit in equity, wherein Piedmont Coal Company and others are plaintiffs and Tower Hill Connellsville Coke Company of [fol. 78] West Virginia is defendant, and permitted the filing of an ancillary bill. The other was entered in the ancillary proceedings so commenced, in which the receivers of Tower Hill Company, the appellants, are plaintiffs and the appellees are defendants. The original suit has been twice before this Court (33 Fed. (2d) 703; 64 Fed. (2d) 817), in each of which certiorari was denied (280 U. S. 607, 64 L. Ed. 650; 290 U. S. 675, 78 L. Ed. 86).

Upon the last appeal in the original cause this court affirmed the decree of the District Court, entered August 25, 1932, which directed that the business and affairs of Tower Hill be terminated and wound up, its property and assets sold and converted into money and distribution thereof made to its creditors and stockholders according to their respective rights and priorities. For that purpose the District Court had appointed A. S. Alexander, H. D. Rummel, and George S. Baton receivers of all the property and assets of Tower Hill of whatsoever character and wheresoever situate, with power to procure the appointment of ancillary receivers whenever and wherever in their judgment such ancillary receivers should be necessary to effectuate any of the provisions of the decree and to institute and prosecute, either in their own names or through such ancillary receivers, all suits and proceedings necessary to recover possession of all the property and assets of the corporation.

On December 12, 1933, the District Court entered an order in the cause referring same to J. E. Campbell as special master, to take, state, and report to the court an account, showing all the debts, obligations and claims against Tower Hill, with the nature, amount, and respective priorities thereof, the owners of the preferred and common

stock of Tower Hill and such other matters as any party in interest might require. And on January 30, 1934, at a hearing duly held by the Special Master in Charleston, West Virginia, pursuant to the order of reference, J. H. Hillman, Jr., A. B. Sheets and Thomas Watson, all of whom are citizens of the Commonwealth of Pennsylvania residing in the Western District thereof, and Hillman Coal and Coke Company and Hecla Coal and Coke Company, each of which is a corporation of the Commonwealth of Pennsylvania having its principal place of business in the Western District thereof, filed certain proofs of claim as creditors and stock-[fol. 79] holders of Tower Hill and testimony was taken with regard thereto. The claim of Hecla is that it is a holder of preferred and common stock of Tower Hill, and the claims of the other claimants are for alleged debts said to be owing by Tower Hill. Each of the claims remains pending and undetermined before the Special Master.

On February 19, 1934, the receivers asked leave of the District Court to file an ancillary bill of complaint against the claimants above named who had filed claims with the Special Master. The ancillary bill tendered for filing at that time alleged that claimants Hillman, Sheets and Watson as directors of Tower Hill had mismanaged the affairs of that corporation and had misapplied its assets in the payment of improper salaries and in the transfer of assets for the benefit of other corporations in which they were interested; that, as a result of their mismanagement, Hecla had received valuable property through an exchange with the Redstone Coal & Coke Co., to which Tower Hill was a party, and in the course of which Tower Hill had parted with property of great value and received property of insignificant value in return; and that the claim of the Hillman Company was based upon an arrangement between that company and Tower Hill growing out of the mismanagement of the latter by Hillman, Sheets, and Watson and that the Hillman Company was liable to the receivers for moneys which it had received pursuant to this arrangement. Most of the causes of action asserted in the ancillary bill appear not to have grown out of the transactions which were the basis of the claims filed with the receivers, but to constitute independent claims in behalf of the receivers against the claimants. The court ordered the ancillary bill filed, with leave to the defendants therein named, however,

to move to dismiss, answer or make such other defen
thereto as might be proper.

On March 19, 1934, a motion to vacate the order of cou
entered February 19, 1934, and to quash the service of th
order and the ancillary bill of complaint was filed by t
defendants named in the ancillary bill, each appearing sp
cially for the purpose of making the motion and witho
submitting to the jurisdiction of the court, but solely f
the purpose of questioning that jurisdiction. The reaso
assigned in the motion were that, at the time of the entry
[fol. 80] the order, the filing of the bill and the alleged ser
ice thereof upon each of the defendants, no one of the d
fendants was or had since been a citizen. resident or i
habitant of, or had been doing business within, the Sout
ern District of West Virginia, but that each of said d
fendants was a citizen, resident, and inhabitant of the ci
of Pittsburgh, in the Western District of Pennsylvania, a
that no legal service had been had upon any of them. Ea
of the defendants filed also a motion to quash the servi
of the ancillary bill and to dismiss it for want of juri
diction, on the same grounds as those alleged in the moti
filed in this cause. The Court sustained the motion a
dismissed the ancillary bill, finding that none of the defen
ants therein named was an inhabitant of the Southern Di
trict of West Virginia, but that each of them was at t
time of the filing of the bill and had since been a reside
of the Commonwealth of Pennsylvania. The receivers ha
appealed in both the original and the ancillary proceeding
but both appeals present the same question, viz., the correc
ness of the order dismissing the ancillary bill.

We think that the learned judge below was correct
holding that the court had not acquired jurisdiction
award any affirmative relief against the defendants nam
in the ancillary bill on the causes of action therein asserte
against them which constituted counterclaims to the clai
filed with the receivers, and not mere defenses to tho
claims. The question involved is not one as to the juri
diction of the court over the causes of action asserted in t
ancillary bill, for it is well settled that the courts of t
United States have jurisdiction to entertain either in equi
or at law as may be appropriate, ancillary proceedings
aid of a receivership suit pending in a federal court, ev
though other elements of federal jurisdiction, such as

versity of citizenship or the jurisdictional amount, may be lacking. White vs. Ewing, 159 U. S. 36; Pope vs. L. N. & A. C. R. Co., 173 U. S. 573; Kirkland vs. Knox, 230 Fed. 806; Carey vs. McMillan (C. C. A., 8th), 289 Fed. 380; Hart vs. Wiltsee, 19 Fed. (2d) 903; Hume vs. City of New York, 255 Fed. 488; Peck vs. Elliott, 79 Fed. 10. The question is whether the court acquired such jurisdiction over the persons who filed claims with the receivers as would authorize the granting of relief against them on counterclaims on which affirmative personal relief was asked and which were [fol. 81] not mere defenses to the claims filed; and we think it clear that this question must be answered in the negative.

The position of appellants is that these persons made themselves parties to the original cause by filing claims before the special master, and that no further service of process upon them, or consent to jurisdiction on their part, was necessary to give the court jurisdiction to award relief against them on the ancillary bill. The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause. Elkins vs. First Nat. Bank of the City of New York (C. C. A., 4th), 43 Fed. (2d) 777; Acme White Lead & Color Works vs. Republic Motor Truck Co., 285 Fed. 88; Jones vs. Laughlin & Sands (C. C. A., 2d), 79 Fed. 913; Youtsey vs. Hoffman, 108 Fed. 693; Sands vs. Greeley Co., 80 Fed. 195; Clark on Receivers, vol. 1, p. 717. And where an ancillary bill, as does the bill here, brings in new parties to the original suit and charges new matter as a basis of relief, the proceeding as against such new parties is an original, not an ancillary, proceeding, and they must be properly served with process to give the court jurisdiction. Duan vs. Clark, 8 Pet. 1; Smith vs. Norfolk, 115 U. S. 143, 148; G. & C. Merriman Co. vs. Saalfield, 241 U. S. 22; Manning vs. Berdan, 132 Fed. 382; Bowers vs. Christian, 16 Fed. 729; Hart vs. Wiltsee, supra.

A case very much in point is Whelan vs. Enterprise Trans. Co., 164 Fed. 95, a decision by Circuit Judge Lowell. That case involved a petition which was filed by a receiver of an insolvent corporation and was treated by consent as a plenary suit in equity ancillary to the principal receivership suit. Recovery was asked against one Paige for moneys collected by him which were alleged to be the property of the corporation. Paige had filed a claim with the receiver. The court held that, although the federal court

would have jurisdiction of an action against Paige as bei
ancillary to the main suit, the remedy at law was adequ
and suit in equity could not be maintained. The court c
sidered whether the fact that he had filed a claim with
receiver did not bring him within the jurisdiction of
court for the purpose of the collection of the receive
claim against him, saying:

[fol. 82] "The court has next to consider if the fact t
Paige filed a claim against the estate in the hands o
receiver appointed by a court of equity brings him wit
the jurisdiction of that court of equity for the purpose
the collection of the receiver's claim against him. T
Paige cannot obtain as matter of right a jury trial conce
ing his claim against the estate may be admitted, but fr
this it does not follow that he waives his right to a ju
trial in case of a claim brought by the receiver against hi
where that claim is made, not by way of set-off, but for
purpose of taking money out of Paige's pocket. Upon
whole, I think that Paige is right in this contention also

The decision of Judge Evans in Youtsey vs. Hoffm
108 Fed. 693, is also very much in point. In that case Ho
man and Feltman had filed a claim in a receivership s
in a state court. The receiver filed what he termed
"answer and set-off" asking recovery of damages agai
Hoffman and Feltman for mismanagement of the corpo
ton while acting as its officers. The action thus institut
was removed into the federal court and a motion to rema
it to the state court was denied on the ground that it w
a new and independent suit, separate and distinct fr
the receivership suit pending in the state court. Jud
Evans said:

As the receive in the case—the mere officer of the co
—was not then a party to the suit, it is clear that the p
mission given to him to file an answer and set-off in a s
to which he was not previously made a party was al
gether unauthorized and irregular. His pleading, und
the circumstances, even when coupled with the leave
the court, must therefore be regarded as the beginning
a new action, and its irregular injection into the one
ready pending cannot give it a higher value or better po
tion than an independent action would have done in det
mining the question now before us. * * * As the clai

filed by Hoffman were admitted to be just, thus closing the receiver's case as to them, and as there were new and distinct claims stated and set up in the so-called answer and set-off of the receiver, which had no connection with Hoffman's claims, due process of law manifestly required that [fol. 83] actual notice, in the way of the service of a summons, should be given to Hoffman in order to bring him before the court upon that pleading. • • • In other words, the receiver, merely as such, was never a party to the suit, unless the filing of the answer and so-called set-off made him a defendant without an express order of the court to that effect, which I doubt; and certainly the receiver, as such, was not entitled ex officio to plead therein any set off against Hoffman, who was at most, only a quasi party to certain other issues in the suit."

It is argued that the court has jurisdiction of the parties to pass upon the matters set up in the ancillary bill, because it is said that a claimant, by filing claim with a receiver and invoking the jurisdiction of the court for the adjudication of that claim, consents that the court adjudicate any claim which the receiver may have against him. The case is said to be analogous to a suit in equity in which the complainant, by filing the suit against the defendant, impliedly consents to being sued by way of counterclaim in a court which would not otherwise have jurisdiction of the cause of action therein asserted. See Equity Rule 30; Texas Co. vs. Borne Scrymser Co. (C. C. A., 4th), 68 Fed. (2d) 104; and General Electric Co. vs. Marvel Rare Metals Co., 287 U. S. 430, in the last of which the Supreme Court said: "The setting up of a counterclaim against one already in a court of his own choosing is very different, in respect to venue, from hailing him into that court."

One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity. He is not in a court of his own choosing, but in a court selected by others, which has taken into its possession the only property from which he can obtain payment of his claim. The complainant who files a bill in equity, and thus subjects himself to equitable counterclaims of the defendant, has had the option of going into either the state or federal courts and of suing in any district in which jurisdiction of the defendant can be obtained. The claimant who files claim with a receiver, on the other hand, has had no

option whatever. Unless he promptly files his claim
the court which has taken jurisdiction of the property,
right to share in the distribution of that property wil
gone; and that court passes upon his claim, without reg
[fol. 84] to citizenship, the amount involved, or other ju
dictional requirements, merely because of the neces
arising out of the fact that it has taken possession of p
erty. The claimant in such case files his claim in the
ceivership suit in order that he may obtain his equit
portion of the property in receivership upon its distribu
by the court; and, as we said in a former opinion her
he makes himself a party to the cause pro hac vice, i
merely for the purpose of having his claim allowed an
sharing in the distribution of the property in which
claims an interest because of the receivership. He has
equitable interest in the property which is in the hand
the receiver; and his position, in so far as coming into
receivership suit for the assertion of his rights is concer
is more nearly analogous to that of a person whose p
erty has been attached, and who must appear and def
for the protection of his interest in the property, tha
that of a complainant who has voluntarily gone into a c
and filed a bill in equity. To permit the receiver to as
in the receivership suit an independent cause of actio
law or in equity against such claimant, or to recover
counterclaim against him merely because he has filed
claim in the receivership suit, would be as unfair a
permit a plaintiff in an attachment suit to amend his c
plaint to allege a new and different cause of action aga
a defendant in attachment, or to permit a non-resident,
has appeared to defend a suit on one cause of action, t
subjected while in the jurisdiction to suit on another
independent cause of action. It is well settled that, i
attachment suit, it is not permissible to amend the pl
ings to set up a new cause of action (6 C. J. 482), and
one who comes into the jurisdiction of a court for the
tection of his interest in litigation there pending is
mune from service of process in another suit. Page
vs. McDonald, 261 U. S. 446; Stewart vs. Ramsey,
U. S. 128.

In so far as the matters set up in the ancillary bill
stitute causes of action at law, there is an additional
son why they may not be asserted in the receivership

That suit is a proceeding in equity; and the claims filed by claimant and any counterclaims thereto would necessarily be heard in equity. The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right [fol. 85] with respect to independent claims against them which the receivers may seek to assert by way of counterclaim. It is well settled that a counterclaim involving a cause of action at law cannot be asserted in a suit in equity, because of the right of the party against whom it is asserted to a jury trial under the Seventh Amendment to the Constitution. American Mills Co. vs. American Surety Co., 260 U. S. 360; Sinclair Refining Co. vs. Midland Oil Co. (C. C. A., 4th), 55 F. (2d) 42, 47.

For the reasons stated, we think that the court below was without such jurisdiction of the parties as would authorize it to adjudicate the counterclaims asserted in the ancillary bill or to grant any affirmative relief with respect thereto. It did have jurisdiction, however, to pass upon any defense, legal or equitable, which might be asserted against the claims filed with the receivers, and to stay action upon those claims until the counterclaims asserted in the ancillary bill could be adjudicated in a court of competent jurisdiction so that they could be set off against the claims, or the amounts payable thereunder, as might be proper. We think, therefore, that, instead of dismissing the ancillary bill, the court below should have retained it, treating it as a petition to stay action on the claims until the counterclaims therein asserted could be adjudicated in a court of competent jurisdiction, and as setting up defenses to the claims in the cases where the matters alleged could be considered as purely matters of defense as distinguished from counterclaims. The order appealed from will accordingly be modified and the cause will be remanded to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counterclaims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of defense against the claims filed. The court should require, however, that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert,

together with any matter which would justify the court in staying action on the claims pending the adjudication of any counterclaim or counterclaims in a court of competent jurisdiction. Modified.

[fol. 86] In United States Circuit Court of Appeals

Separate Opinion

Soper, Circuit Judge:

I concur in the general conclusion of the court that a receiver in equity is entitled in certain contingencies to resist the payment of claims against the estate by the presentation of set-offs or counterclaims against the claimants. The opinion holds in effect that the equity court has jurisdiction: (1) to pass upon a legal or equitable defense to a claim which grows out of the same transaction and is not in excess of the amount of the claim; (2) to stay action on a claim, if a meritorious set-off or counterclaim in law or equity, growing out of the same transaction is alleged, and affirmative relief against the claimant is sought, until adjudication may be had in an independent suit brought by the receiver against the claimant; (3) to stay action on a claim, if a meritorious set-off or counterclaim in law or in equity, growing out of an independent transaction, is alleged, until adjudication may be had in an independent suit brought by the receiver against the claimant.

In my opinion, the jurisdiction of the court to consider a set-off or counterclaim filed by a receiver is even broader. It should be held that the equity court also has jurisdiction (1) to adjudicate fully any set-off or counterclaim in law or equity, growing out of the same transaction, and to grant affirmative relief to the receiver if the facts warrant such action; and (2) to adjudicate any set-off or counterclaim in equity, based on an independent transaction, and to grant affirmative relief to the receiver if the facts warrant such action.

It seems clear that the court has full power to adjudicate completely all set-offs or counter-claims growing out of the same transaction, and the efficient administration of justice requires it, if it can be done in accordance with the federal

constitution. Power to pass upon the merits of a claim, and to consider all defenses growing out of the same transaction to the amount of the claim, is conceded. The limitation implied seems to be unwarranted, and no authority is cited to sustain it. Courts of equity in the administration of estates have long exercised jurisdiction to consider claims presented against the property in their charge, and this function obviously cannot be fully performed, unless all defenses to a claim growing out of the transaction on which the claim is based, whether in excess of the claim or not, [fol. 87] may be considered. The right to adjudicate fully all defenses is inherent in the power to adjudicate the claim. The fact that the claimant is deprived of a jury trial presents no constitutional difficulty; for the proceeding is in equity, and the claimant may not demand a jury trial even though his claim is based upon a right of action at law; and as to the set-offs or counterclaims presented by the receiver, the court of equity, having acquired jurisdiction, will retain it, in accordance with the well established principle of equity jurisprudence, until the whole controversy has been disposed of, although rights of action are involved which ordinarily would be cognizable only in a court of law. It may be noted in passing that the opinion of the court does not question the power of the chancellor to pass on the merits of a legal defense to a claim not in excess of the claim itself.

Furthermore, there seems to be no important reason why Equity Rule 30, promulgated November 4, 1912, should not be applied to the situation which arises when a receiver has a set-off or counterclaim in equity, growing out of an independent transaction, against a claimant. This rule provides in substance that the defendant in his answer to a suit in equity may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim shall have the same effect as a cross suit; so as to enable the court to pronounce a final decree in the same suit on both the original and the counterclaim. By the passage of this rule, the Supreme Court, in order to make it possible to put an end to all controversies between the same parties in a single suit, changed the former practice which confined set-offs and counterclaims to those which arose out of the transaction that formed the

basis of the original suit. Since the filing of a disputed claim against a receiver in an equity proceeding is in one aspect a separate suit, it falls within the scope of Equity Rule No. 30, and the receiver should have the same right to set-off or counterclaim as would have been accorded to the corporation before the receiver was appointed. The decisions relied on in the opinion of the court, Whelan vs. Enterprise Trans. Co., 164 F. 95, and Youtsey vs. Hoffman, 108 F. 693, were rendered prior to the passage of the rule. It would be of great convenience if independent counter-[fol. 88] claims at law might also be adjudicated in the same proceeding, but the Seventh Amendment stands in the way. American Mills Co. vs. American Surety Co., 260 U. S. 360.

The suggestion that this form of procedure would be unfair to the claimant, because it would require him to meet a counterclaim in a jurisdiction not of his choice, should not prevail. A suitor is always compelled to bring a suit in the court which has jurisdiction over the defendant, and in many instances, there is only one court available for the purpose. His choice of courts may be more restricted when his claim must be filed in a receivership proceeding, but the importance of winding up the affairs of an insolvent corporation, under the supervision of a single court, is so great that this result cannot be avoided. Indeed, in cases of receivership, there is an added reason to that which led the Supreme Court to promulgate Equity Rule No. 30. When an estate is being wound up by a receiver under the supervision of a court of equity, there is more involved than the right of any claimant; and controversies between the receiver and the claimants should be adjudicated expeditiously, so that the estate may be speedily liquidated and all the creditors may receive their proportionate shares.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3736

A. S. ALEXANDER, H. D. RUMMEL, and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Appellants,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and Hecla Coal and Coke Company, a Corporation, Appellees

DECREE—Filed and Entered January 23, 1935

[fol. 89] Appeal from the District Court of the United States for the Southern District of West Virginia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, modified as set forth in the opinion of the Court filed herein; that this cause be, and the same is hereby, remanded to the District Court of the United States for the Southern District of Wset Virginia, at Charleston, for further proceedings in accordance with the opinion of this Court; and that the costs on this appeal be divided equally between the parties.

January 23, 1935.

Elliott Northcott, U. S. Circuit Judge.

In United States Circuit Court of Appeals

Petition of Appellants for Rehearing and for Order Staying Mandate—Presented February 19, 1935

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

The petition of A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, respectfully represents:

[fol. 90] (1)

Your petitioners are the Appellants in the above-entitled case.

(2)

January 22, 1935, your Honorable Court rendered a decision in the above-entitled case modifying a decree of the District Court of the United States for the Southern District of West Virginia, which dismissed an ancillary bill of complaint filed by Appellants, your Honorable Court holding that the bill should be retained for certain purposes stated in the opinion, but that the Court had no jurisdiction to grant affirmative relief against Appellees.

(3)

Your Honorable Court held that the question is whether the Court below acquired such jurisdiction over the persons of Appellees as authorized the granting of affirmative relief against them.

The opinion answers this question negatively.

In stating the question, Appellees are described as persons who filed claims with the Receivers, and in answer to the proposition of Appellants it is said (6):

"The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause."

Appellants respectfully suggest that this statement of what was done by Appellees is too narrow. They did not file claims or proofs of claims with the Receivers but actually presented them and offered testimony in support of

them in court in a proceeding in the Primary Cause, as is set out in detail in Appellants' Brief, pages 35-40. Appellants' position is that had what occurred before the Special Master taken place in a proceeding in which the Chancellor was himself sitting, there could be no room for dispute that Appellees appeared in the cause, and in their [fol. 91] judgment that result is in no way minimized by the fact that it occurred before a Master and not the Chancellor in person.

The question in final analysis resolves itself into an inquiry whether what Appellees did amounts to a submission to the jurisdiction of the Court below. In the light of well established principles, the answer to that inquiry is to be found in what they did.

The test of submission is whether the party becomes an actor: Merchants Heat & Light Co. vs. Clow, 204 U. S. 286; 51 L. Ed. 488. The term "actor" is self-defining and means that when any person comes into a pending cause seeking relief through the medium thereof he becomes an actor therein.

It is definitely settled by the case cited that when a person seeks relief by setting up a counter-claim he becomes an actor and by so doing submits to the jurisdiction. A person setting up a counter-claim occupies a position quite analogous to that of Appellees. A person setting up a counter-claim seeks to recoup against the claim asserted against him or to recover a balance. Here Appellees, through the medium of the pending proceeding, seek the advantages of the decree creating the fund and to recover in virtue of a further decree of the Court below. Appellants believe that Appellees became actors in the cause and thereby submitted to the jurisdiction of the Court below, and they with due respect submit that the opinion of your Honorable Court does not give to this consideration the weight and effect to which it is entitled.

(4)

The opinion cites in support of its answer to Appellants' position—

Elkins vs. First National Bank, 43 F. (2d) 777.

Acme White Lead & Color Works vs. Republic Motor Truck Co., 285 Fed. 88.

Jones & Laughlin vs. Sands, 79 Fed. 913.
Youtsey vs. Hoffman, 108 Fed. 693.
Sands vs. Greeley Co., 80 Fed. 195.

[fol. 92] In the ultimate analysis, each of these cases is reduced to a mere question of procedure. Not one of them involves submission to jurisdiction or any similar inquiry.

The Elkins case denied a petition to intervene on the ground that the petitioners were already in a position to assert any claim they desired to make, and in the opinion on the petition for reargument it was pointed out that the petition did not state a good cause of action.

The Acme case is to the same effect. Intervention was denied because the petitioner could obtain full remedy before the Master, without intervention.

The Jones & Laughlin case involves an immature appeal, there having been no final judgment, but the implications of the opinion are rather in favor of Appellants in that it is held that persons having filed claims can appeal from any final decree adverse to them.

The Greeley case is the Jones & Laughlin case in the lower court.

The Youtsey case was one peculiar to the law of Kentucky and in it the Receivers were not treated as parties, while here it is conceded by Appellees and recognized by the opinion of your Honorable Court that they are parties. Furthermore, the Court held that the claim there asserted was not a counter-claim or set-off within the meaning of the Kentucky statute, while here the claim asserted by Appellants is clearly in equity within the meaning of Federal Equity Rule 30.

Your Honorable Court also refers to Whelan vs. Enterprise Transportation Co., 164 Fed. 95. The Court there declined to follow Peck vs. Elliott, 79 Fed. 10, because the claim was a legal one and not cognizable in equity. That question is here irrelevant for, as will appear by an inspection of the ancillary bill, every cause of action set up is of purely equitable character and a court in equity would have had jurisdiction wholly regardless of the receivership.

(5)

Your Honorable Court also holds that when an ancillary bill brings in new parties they must be properly served

with process to give the court jurisdiction, and cites cases.

[fol. 93] Appellants do not dispute that proposition, but their position is that it is inapplicable because the parties were already in court and therefore no question of bringing them in is involved.

Every reason supporting the rule that the court having possession of a res has jurisdiction to adjudicate not only claims to the res but claims of the res against third persons, and every principle out of which it was developed, strengthens Appellants' position on this point. The fundamental idea underlying that jurisdiction is the desirability, if not necessity, of having the whole controversy settled in a single proceeding, and it is just as logical to hold that when persons come into the court to deal with that subject matter they submit themselves to the jurisdiction of that court, as is the rule itself that the court has jurisdiction to adjudicate claims against third persons. It is in perfect harmony with the well known principle that when equity acquires jurisdiction of a portion of a controversy it obtains jurisdiction to determine the whole of the controversy, even if some of the questions are of a legal character: Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207; 71 L. Ed. 612. Here, however, only equitable controversies are involved.

Furthermore, the proposition of Appellants, if not strictly within the letter, is within the spirit of Equity Rule 30.

(6)

The opinion of your Honorable Court says (10):

"The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right with respect to independent claims against them which the receivers may seek to assert by way of counter-claim."

Appellants respectfully suggest that no question of waiver of trial by jury or interference with the right of trial by jury is here involved, for the reason, already pointed out, that their claims, as pleaded in the ancillary bill, are of an equitable nature, cognizable in a court in

[fol. 94] equity and, had there been no receivership, could have been asserted by Tower Hill itself in a court in equity. As respects Appellee, Hillman Coal and Coke Company, Appellants' claim simply involves a complicated accounting. The claim against Hecla Coal and Coke Company arises out of a breach of trust. The claims against the other Appellees arise out of their breaches of trust as officers and directors of Tower Hill and their fraudulent mismanagement of its business and affairs.

(7)

Finally, the opinion states (9):

"One filing a claim with a receiver, however, is in a very different position from one who had filed a bill in equity,"

because, as is said, he is not in a court of his own choosing but in a court selected by others.

This subject is presented at some length in Appellants' Brief (pages 20-23).

The law fixes the court or courts in which one person may sue another. Generally speaking, there is only one tribunal. If there be more than one, it is only because the law attaches that effect to exceptional circumstances, such as the fact that defendant is found or is doing business in a jurisdiction other than that of his domicile. In the first instance, there is no choice; in the latter, the choice is restricted and limited.

It is the law, and not any selection of Tower Hill or its Receivers or any other person, that vests in the District Court of the United States for the Southern District of West Virginia exclusive jurisdiction of claims against Tower Hill. It is just as competent for the law to restrict a claimant to one tribunal as it is for the law to enable him, in certain circumstances, to have a restricted choice of two or more.

Whether Appellees would go in or stay out of the Court below was purely volitional. If it be said that they would have stayed out at the risk of losing their claims, the answer is that they would have been in no different position than any other suitor. If the law decrees that there is but [fol. 95] one tribunal open to a suitor, he must enter that court and assume the risk of counter-claim or abandon his own claim. If by reason of exceptional circumstances more

than one tribunal is open to him, he still must make his election. Will he abandon his claim or will he run the risk of counter-claim in the court in which he determines to assert his own claim? In any event, if he elects to assert his claim he must face the risk of counter-claim in a court in which the law prescribes the defendant may be sued.

Appellants respectfully submit that in appearing before the Special Master in the Court below and asserting their claims, Appellees were in no different position than if they had filed a bill in equity against Tower Hill in a court in which the law prescribed Tower Hill could be sued. When the receivership of Tower Hill occurred and thereby there was vested in the receivership court the exclusive jurisdiction over claims against it, Appellees were in exactly the position of one who has a claim against another. They could assert their claims where the law prescribed Tower Hill and its assets could be found and in so doing assume the risk of whatever result their action entailed. They could abandon their claims, and if the Receivers pursued them in a court to whose process they were subject, they could there assert their own claims as counter-claims. They chose the former course, and while your Honorable Court has properly recognized their just right to appear in the Court below, fully establish their own claims, challenge the claims of others, appeal from any decision of the Chancellor, and participate in the distribution of the assets in accordance with the final decree, you have granted them exemption from liability to counter-claim. The result, it seems to Appellants, is not in harmony with precedent or principle. Whether Appellees be termed formal parties or quasi parties or by whatever other term they may be designated, the fact remains that they are in the Court below asserting claims against Tower Hill and seeking distributions from its funds just as fully, for any and every purpose, as if they had filed a bill in equity against Tower Hill.

Appellants respectfully submit that there is no sound reason in principle or authority why a claimant should be granted exemption from counter-claim simply because the [fol. 96] counter-claimant is in receivership when the law clearly denies such exemption if the receivership did not exist. Tower Hill's counter-claims being of equitable cognizance, their adjudication by the receivership Court is in

exact accord with the spirit and purpose of Equity Rule 30.

(8)

Reference is made in the opinion to General Electric Co. vs. Marvel Rare Metals Co., 287 U. S. 430, in which it is said:

"The setting up of a counter-claim against one already in a court of his own choosing is very different, in respect to venue, from haling him into that court."

This case dealt with waiver of venue, and to bring a voluntary appearance in contrast with compulsory process was the purpose of the part of the opinion quoted. This case was cited by Appellants in their Reply Brief, and they respectfully submit that while it deals only with venue, which Appellees insisted was the only question here involved, its reasoning and the ratio decidendi sustains the contention of Appellants.

Wherefore petitioners pray that a rehearing may be allowed in the said appeal and that the mandate be stayed pending the disposition of this petition.

Edwin W. Smith, Arthur S. Dayton, E. C. Higbee,
Wm. M. Robinson, Counsel for Petitioners.

We hereby certify that the above petition for a rehearing is presented in good faith and not for the purpose of delay, and further, that in our opinion the petition is well founded and the petitioners are entitled to a rehearing.

Edwin W. Smith, Arthur S. Dayton, E. C. Higbee,
Wm. M. Robinson, Counsel for Petitioners.

[fol. 97] In United States Circuit Court of Appeals

Order Staying Mandate—Filed February 27, 1935

Upon the petition of the Appellants, by Edwin W. Smith, Arthur S. Dayton, E. C. Higbee and Wm. M. Robinson, their counsel, and it appearing to the Court that the Appellants have presented a petition for a rehearing in this cause,

It is ordered that the mandate of this Court in the above-entitled cause be, and the same is hereby, stayed pending the action of the Court upon the said petition of the Appellants for a rehearing.

February 27, 1935.

John J. Parker, Senior Circuit Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—Filed and Entered March 2, 1935

[fol. 98] This court having at its January term, 1935, rendered its decision modifying the order of the said District Court appealed from in this cause, and the appellants having on February 19, 1935, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days from this date.

March 2, 1935.

John J. Parker, Senior Circuit Judge.

March 5, 1935, petition of appellants for stay of the mandate pending application in the Supreme Court for a writ of certiorari is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING APPLICATION FOR A WRIT OF CERTIORARI—Filed March 6, 1935

Upon the application of the Appellants, by their counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above cause be, and the same is hereby, stayed pending the application of the Appellants in the Supreme Court of the United

States for a writ of certiorari to this Court, unless otherwise ordered by this Court or the Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

March 6, 1935.

John J. Parker, Senior Circuit Judge.

[fol. 99] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 100] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 6, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,459. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 15. A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers, etc., Petitioners, vs. J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, et al. Petition for a writ of certiorari and exhibit thereto. Filed April 1, 1935. File No. 15 O. T. 1935.